COPY

FILED
SEP 8 1961
JAMES R. BROWNING, Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 394

MICHAEL VINCENT GEAGAN ET AL.,
Petitioners,
v.
JOHN A. GAVIN, Superintendent,
Massachusetts Correctional Institution,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PAUL T. SMITH
MANUEL KATZ
209 Washington Street
Boston 8, Massachusetts
Attorneys for Petitioners
Pino, McGinnis and Costa
ROBERT DEGIACOMO
80 Federal Street
Boston, Massachusetts
Attorney for Petitioner Maffie
LAWRENCE O'DONNELL
418 Adams Street
Dorchester, Massachusetts
Attorney for Petitioners
Geagan, Richardson and
Faherty

Blanchard Printing Company, Boston, Mass. — Law Printers

SUBJECT INDEX

	Page
Opinions of the Courts Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	4
Statement of the Case	4
Reasons for Granting the Writ	27
I. It is a violation of the Due Process Clause of the Fourteenth Amendment for a State, which initiates prosecutions by grand jury indictments, to require those accused of crime to stand trial on indictments which were returned by a grand jury whose members have been prejudiced by massive, prejudicial pre-indictment publicity, especially where such prejudicial publicity has been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the grand jury.	27
II. It is a violation of petitioners' right to a fair and impartial trial, under the Fourteenth Amendment, for the trial judge to require them, over their objections, to stand trial at a time when the prejudicial publicity, which had been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the petit jury, "was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time".	38
A. The constitutional irrelevance of petitioners' failure to move for a change of venue or a continuance.	40

Page

B. The unfairness of holding the trial before the prejudicial effects of the publicity had abated. 45

III. Where petitioners have good reason to assert that the prejudicial publicity, which had been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the petit jury, "was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time", it is a violation of their right to a fair and impartial trial, under the Fourteenth Amendment, for a trial judge to refuse their offer to prove prejudice on the part of jurors, to deny their motion for leave to conduct a voir dire examination of jurors, to refuse to put questions suggested by them to jurors, and then to conduct himself a voir dire examination of jurors in a way not likely to discover whether such jurors were free from the prejudice caused by the pre-trial publicity. 52

IV. It is a violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution for a State to hold petitioners for trial where state and federal enforcement officials have, with calculation to prejudice the petit jury, issued, caused and stimulated massive, sustained, prejudicial, pre-trial publicity "so deep-seated and ineradicable as to make it impossible for (petitioners) . . . to obtain a fair trial at any time during the period within which they might have obtained a constitutionally speedy trial." 64

Conclusion 67

COPY BOUND CLOSE IN CENTER

Page

Appendix A, Opinion of Court Below 68
Appendix B, Opinion of Massachusetts Supreme Judicial Court 78
Appendix C, Headlines and sub-headlines and samples or summaries of, or excerpts from, some of the pertinent news articles and editorials 110
A. Pre-indictment publicity 110
B. Pre-trial publicity 123
Appendix D, How other States provide a defendant with the opportunity to prove prejudice on the part of jurors. 158

Table of Citations

Cases

Page

Aldridge v. *United States*, 283 U.S. 308 .... 53, 54, 61, 62
Attorney General v. *Pelletier*, 240 Mass. 264 ... 31, 35, 36
Bain, Ex parte, 121 U.S. 1 35
Basiliko v. *State*, 212 Md. 248 46
Beck v. *State of Washington*, 365 U.S. 866 ..... 2, 27, 37
Blake v. *State*, 54 Okla. Cr. 62 ..... 35, 36
Burns v. *State of Ohio*, 360 U.S. 252 30
Carrado v. *United States*, 210 F.2d 712 44
Cassell v. *State of Texas*, 339 U.S. 282 .. 28, 29, 31, 33, 34
Chavez v. *United States*, 258 F.2d 816 63
Ciucci v. *Illinois*, 356 U.S. 571 51
Commonwealth v. *Geagan*, 339 Mass. 487 ..... 2, 4
Commonwealth v. *Hanley*, 337 Mass. 384 66
Commonwealth v. *Stone*, 321 Mass. 471 49
Commonwealth v. *Trefethen*, 157 Mass. 180 .... 46, 47, 54
Costello v. *United States*, 350 U.S. 359 ..... 32, 35
Coughlin v. *People*, 144 Ill. 140 60
Daley v. *United States*, 231 F.2d 123 44
DeGolyer v. *Commonwealth*, 314 Mass. 626 ..... 31, 35

Page

Delaney v. *United States*, 199 F.2d 107 .... 42, 43, 45, 46, 47, 50, 51, 55, 59, 63
Dennis v. *United States*, 339 U.S. 162 ..... 47, 58, 61
Douglas v. *Green*, 363 U.S. 192 30
Eskridge v. *Washington State Board of Prison Terms and Paroles*, 357 U.S. 214 30
Eubanks v. *State of Louisiana*, 356 U.S. 584 ..... 28, 30
Ferguson v. *State of Georgia*, 365 U.S. 570 63
Frank v. *Mangum*, 237 U.S. 309 ..... 30, 37
Frasier v. *United States*, 267 F.2d 62 62
Garlitz v. *State*, 71 Md. 293 60
Geagan v. *Massachusetts*, 361 U.S. 895 5
Globe Newspaper Co. v. *Commonwealth*, 188 Mass. 449 ..... 47, 54
Griffin v. *People of the State of Illinois*, 351 U.S. 12 30, 37
Griffin v. *United States*, 295 Fed. 437 46
Hall v. *State*, 24 Okla. Cr. 197 29
Hamer v. *United States*, 259 F.2d 274 53
Hammers v. *State*, 337 P.2d 1097 36
Hayes v. *Missouri*, 122 U.S. 68 55
Holt v. *United States*, 218 U.S. 245 ..... 46, 59, 60, 63
Hopt v. *Utah*, 120 U.S. 430 ..... 55, 58, 60
Hurtado v. *State of California*, 110 U.S. 516 29
Irvin v. *Dowd*, 359 U.S. 394 ..... 37, 64
Irvin v. *Dowd*, 271 F.2d 552 ..... 42, 46, 47, 48
Irvin v. *Dowd*, 81 S. Ct. 1639 .... 6, 37, 42, 46, 47, 48, 52, 53, 55, 58, 59, 60, 61, 62, 64
Janko v. *United States*, 81 S. Ct. 1662 ..... 50, 51
Jones v. *Robbins*, 74 Mass. (8 Gray) 329 ..... 31, 35
Juelich v. *United States*, 214 F.2d 950 63
Kennedy v. *Walker*, 337 U.S. 901 29
Lambert v. *State of California*, 355 U.S. 225 29
Lawn v. *United States*, 355 U.S. 339 32
Leggett v. *State*, 227 Ark. 393 60
Mainville v. *State*, 173 Wis. 12 60

COPY BOUND CLOSE IN CENTER

Page

Malinski v. *People of State of New York*, 324 U.S. 401 33
Marshall v. *United States*, 360 U.S. 310 ..... 50, 51
Meyer v. *Cadwalader*, 49 Fed. 32 46
Michel v. *State of Louisiana*, 350 U.S. 91 ..... 30, 32, 34
Michelson v. *United States*, 335 U.S. 469 49
Mooney v. *Holohan*, 294 U.S. 103 37
Morford v. *United States*, 339 U.S. 258 62
Murchison, In re, 349 U.S. 133 59
Napue v. *State of Illinois*, 360 U.S. 264 37
Palko v. *State of Connecticut*, 302 U.S. 319 65
Parsons v. *State*, 160 Tex. Cr. 387 60
Paschen v. *United States*, 70 F.2d 491 63
People v. *Buddensieck*, 103 N.Y. 487 60
People v. *Duncan*, 350 P.2d 103 52
People v. *Hryciuk*, 5 Ill. 2d 176 ..... 47, 55, 59
People v. *Murawski*, 394 Ill. 236 46
Pfaff v. *United States*, 85 F.2d 309 44
Pierre v. *State of Louisiana*, 306 U.S. 354 .. 28, 29, 31, 46
Pollard v. *United States*, 352 U.S. 354 ..... 64, 65
Provoo, Petition of (*United States* v. *Provoo*), 17 F.R.D. 183, aff'd 350 U.S. 857 ..... 64, 65, 66
Quercia v. *United States*, 289 U.S. 466 44
Reece v. *State of Georgia*, 350 U.S. 85 ..... 28, 30
Reynolds v. *United States*, 98 U.S. 145 ..... 58, 60, 63
Reynolds v. *Cochran*, 365 U.S. 525 29
Rice v. *Emerson*, 181 Okla. 51 60
Rogers v. *Richmond*, 365 U.S. 354 63
Sawyer, In re, 360 U.S. 622 39
Scribner v. *State*, 3 Okla. Cr. 601 60
Sellers v. *United States*, 271 F.2d 475 62
Shepherd v. *State of Florida*, 341 U.S. 50 50
Simon v. *United States*, 123 F.2d 80 44
Singer v. *State of Florida*, 109 So. 2d 7 ..... 42, 46, 47
Snyder v. *Commonwealth of Massachusetts*, 291 U.S. 97 65

Page

Spells v. *United States*, 263 F.2d 609 63
Spies v. *Illinois*, 123 U.S. 131 ..... 55, 58, 60
State v. *Anderson*, 239 Iowa 1118 60
State v. *Beck*, 155 Wash. Dec. 565 37
State v. *Crowder*, 193 N.C. 130 36
State v. *Fujita*, 20 N.D. 555 60
State v. *Johnson*, 362 Mo. 833 60
State v. *Jones*, 306 Mo. 437 29
State v. *Megorden*, 49 Or. 259 60
State v. *Sheerin*, 12 Mont. 539 60
State v. *Simmons*, 120 N.J.L. 85 60
State v. *Tate*, 185 La. 1006 29
State v. *Thorne*, 41 Utah 414 60
Stephens v. *People*, 38 Mich. 739 60
Stirone v. *United States*, 361 U.S. 212 35
Stroble v. *State of California*, 343 U.S. 181 .... 41, 44, 51
United States v. *Clancy*, 276 F.2d 617 63
United States v. *Lee*, 107 F.2d 522 44
United States v. *Provoo* (*Petition of Provoo*) 350 U.S. 857 aff'g. 17 F.R.D. 183 64
United States ex rel. Darcy v. *Handy*, 351 U.S. 454 .. 41, 42, 44, 51, 62
Wagner v. *United States*, 264 F.2d 524 63
Williams v. *State*, 188 Ind. 283 36

Constitutional Provisions

United States
Fifth Amendment 32, 33
Sixth Amendment 64
Fourteenth Amendment 2, 3, 4, 5, 6, 8, 10, 27, 29, 30, 31, 32, 33, 34, 35, 37, 38, 40, 41, 42, 43, 51, 52, 53, 59, 63, 64, 65, 66
Massachusetts
Declaration of Rights, Art. 12 31

COPY BOUND CLOSE IN CENTER

Statutes

	Page
United States	
18 U.S.C. s. 3282	21
28 U.S.C. s. 1254(1)	2
28 U.S.C. s. 2241	5
Massachusetts	
G.L. (Ter. Ed.) c. 234, s. 28	53, 55
G.L. (Ter. Ed.) c. 234, s. 29	15, 16
G.L. (Ter. Ed.) c. 277, s. 72	43

Miscellaneous

24 Am. Jur.	37
38 C.J.S.	35, 36
Frankfurter, Of Law and Men (Elman ed. 1956)	50
Federal Rules of Criminal Procedure, Rule 12 (a)	66
Federal Rules of Criminal Procedure, Rule 24 (a)	62
Supreme Court Rules, Rule 21	2
Sutherland, Crimes, Courts and Newspapers, Nieman Reports, April, 1956, pp. 39-41	28, 36
2 Wharton, Criminal Procedure (1918)	35

In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

MICHAEL VINCENT GEAGAN ET AL.,
Petitioners,

v.

JOHN A. GAVIN, Superintendent,
Massachusetts Correctional Institution,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Michael Vincent Geagan, Joseph F. McGinnis, James Ignatius Faherty, Anthony Pino, Thomas Francis Richardson, John Adolph Maffie and Vincent James Costa, by their attorneys, severally pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered on June 30, 1961.

Opinions of the Courts Below

The opinion of the Court of Appeals for the First Circuit, printed in Appendix A hereto, *infra*, p. 68, is as yet unreported. The opinion of the District Court, printed in the Record Appendix to Brief For Appellants in the court below, p. 404,[1] is reported in 181 F. Supp. 466. The opinion of the Supreme Judicial Court of Massachusetts, printed in Appendix B hereto, *infra*, p. 78, is reported in 339 Mass. 487, 159 N.E. 2d 870.

Jurisdiction

The judgment of the court below was entered on June 30, 1961, and is contained in the certified copy of Record Appendices for the Parties and Proceedings in Court of Appeals to and Including July 11, 1961, filed with this petition. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

I. Is it a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States for a State, which initiates prosecutions by grand jury indictments, to require those accused of crime to stand trial on indictments which were returned by a grand jury whose members have been prejudiced by massive, prejudicial, pre-indictment publicity, especially where such prejudicial publicity has been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the grand jury?[2]

---

[1] Nine copies of the Record Appendix to Brief for Appellants in the court below and nine copies of Appellee's Record Appendix in the court below have been filed for consideration by this Court under the provisions of paragraph 4 of Rule 21 of Supreme Court Rules.

[2] This is the same issue as the first issue raised in *Beck* v. *State of Washington*, 365 U.S. 866, 81 S. Ct. 900.

II. Is it a violation of petitioners' right to a fair and impartial trial, under the Fourteenth Amendment, for the trial judge to require them, over their objections, to stand trial at a time when the prejudicial publicity, which had been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the petit jury, "was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time?"[3]

III. Where petitioners have good reason to assert that the prejudicial publicity, which had been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the petit jury, "was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time",[4] is it a violation of their right to a fair and impartial trial, under the Fourteenth Amendment, for the trial judge to refuse their offer to prove prejudice on the part of jurors, to deny their motion for leave to conduct a voir dire examination of jurors, to refuse to put questions suggested by them to jurors, and then to conduct himself a voir dire examination of jurors in a way not likely to discover whether such jurors were free from the prejudice caused by the pre-trial publicity?

IV. Is it a violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution for a State to hold petitioners for trial where state and federal enforcement officials have, with calculation to prejudice the petit jury, issued, caused and stimulated massive, sus-

[3] Appendix A hereto, *infra*, p. 71.
[4] Appendix A hereto, *infra*, p. 71.

tained, prejudicial pre-trial publicity "so deep-seated and ineradicable as to make it impossible for (petitioners) . . . to obtain a fair trial at any time during the period within which they might have obtained a constitutionally speedy trial"?[5]

Constitutional Provision Involved

Section 1 of the Fourteenth Amendment to the constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

A. *The Judicial History*

This is a habeas corpus proceeding, brought to test the validity of petitioners' convictions and life sentences[6] for various offenses arising out of the $1,219,000 so-called "Brink's Robbery" in the Superior Court for Suffolk County, Massachusetts. The Supreme Judicial Court of the Commonwealth of Massachusetts affirmed the convictions in *Commonwealth* v. *Geagan*, 339 Mass. 487, 159 N.E.

---

[5] Appendix A hereto, *infra*, p. 70.

[6] Actually, each petitioner also received a two year sentence to be served on and after his life sentence.

COPY BOUND CLOSE IN CENTER

2d 870 (Appendix B hereto, *infra*, p. 78), and this Court denied direct review by certiorari, 361 U.S. 895, 80 S. Ct. 200.

Thereafter, petitioners sought a writ of habeas corpus, under 28 U.S.C. s. 2241, in the District Court for the District of Massachusetts, claiming that their convictions had been obtained in violation of the Fourteenth Amendment in that massive, sustained publicity, calculatedly instigated and stimulated by federal and state enforcement officials prejudiced the grand jury which indicted them and the petit jury which tried them, and made it impossible for them to obtain a fair trial at any time during the period within which they might have obtained a constitutionally speedy trial. (R.[7] pp. 3-9; Appendix A hereto, *infra*, p. 70.)

After a hearing, the District Court ordered the entry of a judgment denying their petition for writ of habeas corpus. In an opinion accompanying this order, the District Court found that petitioners had "clearly exhausted their state court remedies", having "seasonably prosecuted an appeal to the highest state tribunal and seasonably filed in the Supreme Court of the United States a petition for certiorari seeking review of the state court judgment . . . "; that petitioners had seasonably raised the very same constitutional issues in both state courts and in the Supreme Court of the United States; and that both state courts had "assumed *arguendo* that every fact now alleged or sought to be proved by the prisoners was indeed true." The opinion also disclosed that the District Court made the very same assumptions that had been made by both state courts. (R. pp. 404-420.)

However, the District Court concluded (a) that a person who subsequently received a fair trial could hardly complain that he had been denied constitutional due process

[7] "R." refers to Record Appendix to Brief for Appellants in the court below.

just because he had been indicted by state grand jurors whose deliberations had been infected by the calculated actions of the government; (b) that because petitioners had deliberately failed to move for a change of venue or to move for a continuance, and had the benefit of a fairly conducted voir dire examination of the jury which tried them, they were not held in custody in violation of their rights under the Due Process Clause of the Fourteenth Amendment; and (c) that the petitioners' contention that they were denied a constitutionally speedy trial was premature. (R. pp. 409-419.)

On appeal, the Court of Appeals for the First Circuit, affirmed the judgment of the District Court: first, holding, contrary to the District Court, that since there was "*certainly some basis for counsels' assertion that the prejudicial publicity was so widespread and continuous that the defendant would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time, it seems to us that for the purposes of this particular appeal the defendants should stand no worse for their counsels' failure to ask . . . for a change of venue or a continuance*"; then stating that "nothing would be gained by repeating what has already been so well said" by the District Court and the Supreme Judicial Court, and limiting, as a result, their consideration to the implications of *Irvin* v. *Dowd*, 81 S. Ct. 1639, decided June 5, 1961; and finally concluding that the petit jurors who tried petitioners fully met the "constitutional test of impartiality laid down" in that case. (Appendix A hereto, *infra*, pp. 68-77.) (Emphasis added.)

B. *The Proceedings in the State Courts*

On January 13 and January 16, 1956, almost six years to the day after the robbery, a Suffolk County grand jury

returned indictments charging the seven petitioners as well as Joseph J. "Specs" O'Keefe, who later pleaded guilty and turned state's evidence, and Joseph S. Banfield, Stanley A. Gusciora and Henry Baker, all three of whom are now deceased, with various crimes arising out of the "Brink's Robbery", which occurred on January 17, 1950, in Boston. (S.[8] pp. 1, 352, 427.)

All of petitioners, when arraigned, were held in the sum of $200,000 with double surety and, of course, none was able to make bail.[9] As a result, each of the petitioners has

---

[8] "S." refers to the two volumes entitled *Summary of Record, Assignment of Errors.* At the hearing in the District Court petitioners introduced in evidence the record in the state courts and on petition for writ of certiorari in this Court: 2 volumes entitled *Summary of Record, Assignment of Errors;* 55 volumes of the transcript of the proceedings before the Superior Court; and 5 volumes of news articles marked as exhibits A to E, inclusive in the Superior Court. All of the foregoing was marked "Petitioners' exhibit 1" in the District Court. (R. pp. 385-386.) The 5 volumes of news articles will be referred to as Exhibits A-E. The court below granted leave to petitioners "to omit from reproduction in record appendices to their briefs two volumes captioned *Summary of Record, Assignment of Errors* and Exhibits A, B, C, D and E," and ordered that "Court and counsel may refer to said volumes and exhibits in their physical form with the same force and effect as if so reproduced, . . . " On July 10, 1961, the court below "ordered that the following original papers in this case be transmitted to the Supreme Court of the United States for use in connection with a petition for a writ of certiorari and that when this purpose shall be accomplished said original papers will be returned to this court: (1) Volumes I and II of the *Summary of Record, Assignment of Errors;* (2) the 55 volumes of the transcript of the proceedings in the Superior Court for Suffolk County; (3) the 5 volumes of news articles marked Exhibits A-E, inclusive,." (R. pp. 455-456.)

[9] Some of the petitioners immediately filed a petition for writ of habeas corpus in the Superior Court seeking their immediate release or the reduction of the bail under which they were held on the ground that the bail was excessive. So far as petitioners know, this was the only means by which the excessiveness of the bail could have been attacked in Massachusetts in time to avoid becoming moot. Their petitions were denied, and because of the time element, it was pointless to seek a review of that denial. See, for example, Superior Court for Suffolk County, Civil Docket Nos. 500211-500213.

been held in custody ever since the time of his arraignment. (S. pp. 5, 8, 357-432; R. 58-61.)

Each petitioner seasonably filed a motion to quash, a plea in abatement and a plea in bar addressed to each indictment in which he was named as a defendant. Each of those pleadings, so far as here material, alleged that his rights under the Fourteenth Amendment had been violated. (S. pp. 6, 15-63.)

Ground 1 alleged that the indictments had been returned by grand jurors who had been prejudiced by massive, prejudicial publicity, calculatedly issued, caused and stimulated by state and federal enforcement officials. (S. pp. 15-16.)

Ground 6 of the special pleadings complained that petitioners were unable to secure a fair trial as well as a constitutionally speedy trial because any petit jury which might be selected to try them had been prejudiced by the massive, sustained publicity, calculatedly issued, caused and stimulated by state and federal enforcement officials. (S. pp. 17-19.)

In support of their allegations of constitutional wrong doing, petitioners filed an affidavit (S. pp. 19-47) to which was annexed copies of five federal complaints and a Department of Justice news release (mention of which will be made later), and accompaning which were two volumes of some of the prejudicial news articles appearing in the press both before and following the return of the indictments.

The trial judge of the Superior Court heard arguments on the constitutional issues raised by petitioners' first special pleadings on May 29, June 1 and June 4, 1956. At the hearing, petitioners first introduced in evidence the two volumes of news articles which they had previously filed with their special pleadings and a third volume of news articles covering the period of time from the time they filed the first two volumes to the time of the hearing. They were marked Exhibits A, B and C. Petitioners then insisted

upon the right to introduce other evidence in support of their charges that the governmentally inspired publicity had prejudiced the grand jurors who had indicted them, as well as any petit jury which might be selected to try them. The trial judge refused to let petitioners prove their charges and instead he assumed the truth of what the petitioners had alleged in their special pleadings, what had been stated in their affidavit, and everything that appeared in the news articles which had been introduced in evidence, but concluded that the grounds relied on were insufficient as a matter of law.[10] He overruled and denied petitioners' special pleadings and petitioners duly saved their rights. (R. pp. 66-76.)

The trial judge then set August 6, 1956, as the date on which the trial would commence, despite petitioners' objection that it would be impossible to get a fair trial at that time and subject to petitioners' exception. Before fixing that date, the trial judge told petitioners that if they wanted a continuance because of the prejudicial publicity, he would give the need for a continuance consideration, but only if they would request a continuance, and if they did, he would interpret their request as a waiver of their claim for a speedy trial. Petitioners replied that they would go to trial only when they were ordered to do so over their objections that they could not get a fair and impartial trial. (R. pp. 76-79.)

On August 6, 1956, the day set for the commencement of the trial, and on every day thereafter, the seventh floor of the Pemberton Square courthouse had all the appearances of a fortress. Only those with proper credentials were permitted to gain access to the seventh floor. Once on the

[10] The Commonwealth conceded on page 9 of the brief which it filed in the Massachusetts Supreme Judicial Court that its motion to dismiss petitioners' special pleadings could "be treated as recognizing an issue as though raised by a demurrer *ore tenus*."

seventh floor, one could only enter the courtroom area through security doors with peepholes, behind which stood armed police officers. Everywhere one looked, one saw uniformed police officers. Anyone looking through any of the windows in the courtroom could readily observe police officers, carrying shot guns or similar weapons, standing on guard on the roofs of nearby buildings. (Ex. D, pp. 821, 822, 843, 845.)

It was this atmosphere that prevailed throughout the trial.

On the morning of August 6, as soon as court was opened, petitioners filed a second motion to quash, a second plea in abatement and a second plea in bar contending once more that they were unable to secure a fair and constitutionally speedy trial. They filed a second affidavit in support of their second special pleadings and they introduced in evidence the three volumes of news articles covering the period from January 12, 1956, to May 29, 1956, which had been introduced in evidence and marked Exhibits A, B and C at the hearing on their first special pleadings, and two more volumes covering the period from May29, 1956, to August 6, 1956, which were marked Exhibits D and E. The trial judge treated the second special pleadings in the same way that he had treated the first special pleadings. While he assumed the truth of what petitioners had alleged in their special pleadings, what they had stated in their affidavits, and what appeared in the news articles that had been introduced in evidence, he ruled, subject to petitioners' exception, that the second special pleadings were also insufficient as a matter of law. (R. pp. 78-86.)

The Commonwealth then moved for trial on thirteen indictments. Again petitioners voiced their objection that because of the governmentally inspired publicity, they could not then get a fair trial. Despite their objection and sub-

COPY BOUND CLOSE IN CENTER

ject to their exception, the trial judge ordered the trial to proceed.

The trial judge apparently knew that because of the publicity, petitioners would have a difficult time getting a fair jury. For that reason he had previously ordered that two thousand men and women be served to appear for jury duty in this case. They were summoned to appear in groups of one hundred on consecutive days starting on August 7, 1956.

On August 7th the voir dire examinations of prospective jurors commenced.

Prior to the examination of any veniremen, petitioners filed a motion for questions to jurors listing thirty-eight questions which sought to elicit the extent of what the prospective juror had read or heard about the Brink's case. Questions 7-38 read as follows:

7. Have you read any articles in any newspapers or magazines concerning the Brink's case?

8. Have you seen or heard any newscasts on television or radio concerning the Brink's case?

9. Have you read or heard that J. Edgar Hoover, Director of the F.B.I. or Herbert Brownell, Attorney General of the United States, or the Department of Justice has said that the Brink's case had been solved and that these defendants had committed that robbery?

10. Have you read or heard what J. Edgar Hoover or Herbert Brownell or the Department of Justice has said about how the Brink's case had been solved?

11. Have you read or heard what J. Edgar Hoover or Herbert Brownell or the Department of Justice has said about how these defendants planned and committed the Brink's robbery?

12. Have you read or heard what J. Edgar Hoover,

Herbert Brownell, or the Department of Justice has said about the criminal records and records of arrests of these defendants?

13. Do you have confidence in the truth of what is said by J. Edgar Hoover, Herbert Brownell or the Department of Justice?

14. Have you read or heard that the Brink's case was solved and that these defendants had committed that robbery?

15. Have you read or heard how the Brink's case was solved?

16. Have you read or heard that these defendants planned and committed the Brink's robbery?

17. Have you read or heard about the criminal records and records of arrests of these defendants?

18. Have you read or heard that Specs O'Keefe has pleaded guilty to participating in the Brink's robbery?

19. Have you read or heard that Specs O'Keefe has named these defendants as those who participated with him in committing the Brink's robbery?

20. Have you read or heard that one or more of these defendants was linked with the alleged murder of Carleton O'Brien of Rhode Island?

21. Have you read or heard that one or more of these defendants had engaged one Elmer Trigger Burke to kill Specs O'Keefe?

22. Have you read or heard that one or more of these defendants was linked with the disappearance of one John Carlson who supposedly helped Specs O'Keefe when allegedly wounded by Trigger Burke?

23. Have you read or heard that one or more of these defendants was linked with the escape of Trigger Burke from the Charles Street Jail?

24. Have you read or heard that the Brink's rob-

bery was linked with the death of Carleton O'Brien of Rhode Island?

25. Have you read or heard that the Brink's robbery was linked with the death of George D. O'Brien, acquitted in the so-called Danvers larceny?

26. Have you read or heard that the Brink's robbery was linked with the alleged attempt by Trigger Burke to kill Specs O'Keefe?

27. Have you read or heard that the Brink's robbery was linked with the disappearance of one John Carlson who supposedly helped Specs O'Keefe when allegedly wounded by Trigger Burke?

28. Have you read or heard that the Brink's robbery was linked with the escape of Trigger Burke from the Charles Street Jail?

29. Have you read or heard that there had been a bomb plot to seal Specs O'Keefe's lips while Specs was confined to the Cambridge Jail after having pleaded guilty to the Brink's robbery?

30. Have you read or heard that William Cameron who was murdered on June 11, 1956, was supposedly a star witness for the Government in this case?

31. Have you read or heard that there is a feverish hunt on by the F.B.I. to locate a key state Brink's witness feared to have been slain?

32. Have you read or heard that Garrett H. Byrne, District Attorney for Suffolk County, or his assistant, Edward Sullivan, has said, "We have an excellent case against all involved to present when we go to Court with them"?

33. Have you read heard that Garrett H. Byrne, District Attorney for Suffolk County, or his assistant, Edward Sullivan, has said that corroboration has been obtained to most of O'Keefe's statements to bolster the State's case?

34. Have you read or heard that Garrett H. Byrne, District Attorney for Suffolk County, or his assistant, Edward Sullivan, has said, "So far everything he (O'Keefe) has told us has been checked and found to be accurate"?

35. Have you read or heard that Garrett H. Byrne, District Attorney for Suffolk County, or his assistant, Edward Sullivan, said that each day brings more substantiation of O'Keefe's story and that more and more evidence is being accumulated against the Brink's bandits?

36. Have you read or heard that Garrett H. Byrne, District Attorney for Suffolk County, or his assistant, Edward Sullivan, said that, "We have in our possession several admissions of Stanley A. Gusciora which we obtained from him in connection with the Brink's robbery"?

37. Do you have confidence in the truth of what the District Attorney or what his assistants say?

38. Do you believe that some of these defendants are hardened criminals who would not stop at even murder to escape detection or conviction for any crime committed by them? (R. pp. 98-102.)

That motion was taken under advisement. (R. p. 86.)

Immediately after the first prospective juror was declared indifferent by the trial judge and satisfactory to the Commonwealth, petitioners moved for leave to conduct a voir dire examination of that prospective juror and moved as an alternative that the trial judge put the questions listed in their motion for questions to each prospective juror. In other words, petitioners again sought the opportunity to prove that governmentally instigated publicity had prejudiced the veniremen. At the time, they introduced in evidence once again the affidavits in support of their

COPY BOUND CLOSE IN CENTER

special pleadings and the five volumes of news articles covering the period from January 12 to August 6, 1956, and offered to prove that if that prospective juror were allowed to answer the questions set forth in their motion for questions to jurors, his answers would demonstrate that he had read and heard a great deal of prejudicial matters concerning petitioners. Once again, the trial judge refused to let petitioners prove their charges. The trial judge denied the motions, and then one of petitioners challenged peremptorily, after first saving petitioners' rights to the denial of their motions and to the trial judge's ruling that the prospective juror was indifferent. (R. pp. 95-102.)

That same procedure was followed whenever a veniremen was held to be indifferent and the Commonwealth was content, until all of petitioners' peremptory challenges were exhausted.

In all, 1104 veniremen were examined in open court.

239 were excused because of ill health, hardship or other reasons, ofttimes before they were questioned about prejudice or bias.

559 admitted to having an opinion. Of that number, 426 testified that their opinions were firmly fixed and were excused. The remaining 133 testified that they could divorce their pre-conceptions from their minds and were declared indifferent by the court.

163 were challenged peremptorily by the government. Most of those were challenged after petitioners had exhausted their peremptory challenges.

Petitioners exercised 262 peremptory challenges—the total number allowed to them.[11]

---

[11] Mass. G.L. c. 234, s. 29 (as amended through St. 1955, c. 485, s. 1), read: "Upon the trial of an indictment for a crime punishable by death or imprisonment for life, each defendant shall be entitled to twelve peremptory challenges of the jurors called to try the case, and in other criminal cases each defendant shall be entitled to three such challenges; provided, that each defendant in a captial case in which

Ultimately, after petitioners had exhausted their 262 peremptory challenges, 14 veniremen were declared indifferent by the court and acceptable to the Commonwealth.

Twelve of the 14 jurors selected to serve on the jury answered in the negative each of the following three questions:

> "Have you expressed or formed an opinion as to the guilt or innocence of any of these defendants?
>
> "Are you conscious of any bias or prejudice for or against anyone in this case?
>
> "Do you know of any reason that would prevent you from reaching a fair and impartial decision or verdict on the evidence as it will be presented to you here and under the law as the court will give you the law?"

They were the only questions asked by the trial judge of those twelve jurors touching on the subject of the newspaper publicity or prejudice. (R. pp. 361-385.)

The remaining two jurors, Wolusky and Leary, admitted having an opinion of some sort. The following colloquy took place in the examination of Juror Wolusky:

> "Q. Have you formed or expressed any opinion as to the guilt or innocence of any of these defendants? A. I don't have a firm opinion.
>
> * * *
>
> Q. Are you aware of any bias or prejudice for or against anyone in this case? A. Not that I know of.
>
> * * *

---

additional jurors are chosen under section twenty-six B shall be entitled to one additional peremptory challenge for each additional juror. In every criminal case the commonwealth shall be entitled to as many such challenges as equal the whole number to which all the defendants in the case are entitled. . . . " See now Mass. G.L. c. 234, s. 29 (as amended through St. 1957, c. 335), which was enacted upon the recommendation of the Judicial Council. 1956 Pub. Doc. No. 144, p. 42.

COPY BOUND CLOSE IN CENTER

The Court: The juror is indifferent.

* * *

Mr. Smith: The same objection and exception and challenge for cause for all defendants. Specifically we object and except to your Honor's ruling that the venireman stands indifferent, because of the statement that he, and I quote, said, "I don't have a firm opinion," which indicates he has some opinion.

The Court: Very well. When I asked you that question I understood that you would be able to take the oath of a juror, to well and truly try the issues between the Commonwealth and the defendant, according to the evidence, that would be uninfluenced in any way by any preconceived notions.

* * *

The Juror: You are right, because I don't convict anyone unless I know the facts, and I don't know the facts.[12] (R. pp. 361-363.)

The following colloquy occurred in the examination of Juror Leary:

Q. Do you know of any reason why you cannot serve on this jury? A. No, your Honor.

Q. Have you expressed or formed any opinion as to the guilt or innocence of any of these defendants? A. I have a tentative opinion; could be changed.

* * *

Q. If you are accepted as a juror, an oath will be administered to you that you will well and truly try

[12] The trial judge had ruled that in order to save time the petitioners would not be required to reassert every time their request for leave to conduct a voir dire and their motion for questions to jurors, reintroduce in evidence their affidavits in support of their special pleadings and the five volumes of newspaper articles, and offer to prove what each prospective juror had read about the Brink's case.

the issues between the Commonwealth and these defendants, according to the evidence, which means that you should serve with an open mind and decide the case purely on the evidence as it will be presented here, uninfluenced by any preconceived notion, ideas, or opinions that you may now have. Do you think you could take that oath and adhere to it faithfully? A. I do, your Honor.

• • •

Q. Are you aware of any prejudice or bias for or against anyone in this case? A. No, your Honor.

Q. Do you know of any reason that would prevent you from reaching a fair and impartial decision or verdict exclusively on the evidence and under the law as the Court will give you the law? A. No.

• • •

Mr. De Giacomo: If your Honor please, before the juror is sworn, since the interrogation has indicated that the juror testified that he had a tentative opinion, but it could be changed, would your Honor address questions to the juror as to whether or not he knows how much evidence would be necessary to change his opinion?

Q. (By the Court) Mr. Leary, if you are sworn as a juror, you will be instructed by the Court that every defendant is presumed to be innocent, and that it will be your duty to bring in a verdict, return a verdict of Not Guilty, unless you are convinced beyond a reasonable doubt on the evidence and the law that he is Guilty.

Now, do you think that your opinion, or whatever notions you have, will interfere with carrying out that oath, those instructions? A. No, your Honor. (R. pp. 383-385.)

COPY BOUND CLOSE IN CENTER

In each of the 14 instances, petitioners also challenged for cause: they reasserted their request for leave to conduct a voir dire and their motion for questions to jurors; that is, they reasserted their request for the opportunity to prove prejudice, and they reintroduced in evidence the affidavits in support of their first and second special pleadings and the five volumes of news articles, and they made the offer of proof already described. Their offer to prove prejudice was rejected and they then excepted to the trial judge's rulings. (R. pp. 362, 364-365.)

Petitioners claimed a separate exception in the cases of jurors Wolusky and Leary because of the trial judge's ruling of indifference despite an indicated opinion. All fourteen were sworn and served as jurors in the case. Two, not Wolusky and Leary, were later withdrawn after all the evidence was in to reduce the 14 man jury to 12 members. (R. p. 385)

On August 30, 1956, views were taken and the government opened its case. While petitioners concede that the Commonwealth introduced evidence at the trial sufficient, if believed, to warrant petitioners' convictions as charged, no witness, except for O'Keefe who had previously pleaded guilty, was able to identify any of the participants and many witnesses furnished alibis for petitioners. Moreover, many of the prejudicial matters assumed to have been released by the prosecutors "for conspicuous and continuous publication" were never offered in evidence, and, as will be shown, could not have been introduced in evidence over petitioners' objection. Verdicts of guilty were returned by the jury. Petitioners were sentenced as indicated and seasonably appealed to the Supreme Judicial Court, raising, among others, the questions which are raised here.[13] After

[13] Respondent's return to petitioners' petition for habeas corpus admitted that petitioners' petition was based upon the same grounds which had been raised in the Massachusetts Superior Court, the Massachu-

affirmance of the judgments of the Superior Court by the Supreme Judicial Court, petitioners seasonably petitioned for a writ of certiorari to the United States Supreme Court and that too, as already indicated, was denied.

C. *The Prejudicial Publicity Assumed to be True by Both State Courts, the District Court and the Court of Appeals*

Five of the petitioners and one of the deceased defendants were arrested at different times during the morning of January 12, 1956, on warrants of arrest obtained the day before from a United States Commissioner sitting in Boston. The other two were not arrested until some time in May. Before seeking those federal warrants, the District Attorney for Suffolk County, Garrett H. Byrne, conferred with officials of the United States Department of Justice. They discussed O'Keefe's confession implicating petitioners and the question of whether the state or the federal government would prosecute.[14] They knew at the time that

---

setts Supreme Judicial Court and the United States Supreme Court on petition for writ of certiorari and that there were no issues presented to the District Court that had "not been tried and reviewed both by the Supreme Judicial Court of Massachusetts and the Supreme Court of the United States on petition for writ of certiorari." (R. pp. 10-14.)

[14] As has been shown, petitioners filed special pleadings to the indictment which were supported by affidavits (S. 19-47, 82-83) and literally hundreds of news articles (Exs. A-E). The trial judge, in passing upon the constitutional questions raised by those special pleadings not only assumed the truth of the allegations thereof and of the contents of the affidavits, but also said, while speaking about Exs. A, B, and C: "Without prejudice, subject to change, the court is of the opinion right now that whatever was published in the paper will be taken as true unless the District Attorney representing the Commonwealth makes an issue of any particular statement." (R. p. 70.) The District Attorney never made an issue of any particular statement and the trial judge never changed his position. Moreover, the Commonwealth conceded on page 9 of the brief which it filed in the state appellate court that its motion to dismiss petitioners' special pleadings could "be treated as recognizing an issue as though raised by a demurrer *ore tenus*".

any federal offenses for which petitioners could be prosecuted had been outlawed by the statute of limitations but that Massachusetts had a ten year statute of limitations which still had more than four years to run.[15] They talked about obtaining federal warrants and about the preparation of a news release which would be issued throughout the country simultaneously with petitioners' arrest. They talked about the continuance of close cooperation between state and federal enforcement officials. (S. pp. 19-20.)

Following that conference, F.B.I. agents appeared before a United States Commissioner and made five complaints charging petitioners and O'Keefe, Baker, Banfield and Gusciora with various federal offenses arising out of the "Brink's Robbery." At the time, the Department of Justice never intended to prosecute those federal complaints but sought the federal warrants merely as a makeweight for the news release which would be issued simultaneously with the arrest of petitioners under those warrants. As a matter of fact, on January 19, 1956, just eight days after the federal complaints were made, the United States Attorney applied to the District Court for leave to dismiss those federal complaints because "difficult legal problems involving the statute of limitations (18 U.S.C. s. 3282 as amended) will arise in the prosecution of the crime". (S. pp. 20, 23.)

Simultaneous with their arrest[16] during the morning of January 12, 1956, the news release (S. pp. 39-47), about which state and federal enforcement officials had consulted,

---

[15] Even Attorney General Brownell said that the federal statute of limitations had run on the substantive offenses, that petitioners could only be prosecuted in the federal courts for a continuing conspiracy for which the maximum punishment was only five years, and that as a result petitioners would be prosecuted in Massachusetts where they could get life imprisonment on the substantive charges. (Ex. A 5, 15, 18, 47, 154A.)

[16] Petitioners Faherty and Richardson were not apprehended until May 16, 1956.

was issued throughout the country to the press and to radio and television. (S. p. 20.)

The release stated that the "Department of Justice announced that intensive investigation by the F.B.I. for the past six years has resulted in the solution of the one million dollar Brink's robbery"; that "of the eleven members of the gang responsible for the robbery, the F.B.I. this morning (January 12, 1956) arrested six" on warrants issued by a United States Commissioner at Boston; that "J. Edgar Hoover, Director of the F.B.I., identified the six arrested persons as Baker, Costa, Geagan, Maffie, McGinnis and Pino," the two gang members now in prison as O'Keefe and Gusciora, and the deceased member as Banfield. The release told that "all of the persons named except Faherty were among the many witnesses who appeared before the federal grand jury which held hearings in Boston between November 25, 1952, and January 9, 1953, in regard to the Brink's robbery"; and proceeded in considerable detail to outline how the gang had systematically planned and studied for the robbery, how the robbery was carefully executed, and how some of the members of the gang made a preliminary effort to count the loot that same evening, "but quickly dispersed to establish alibis for themselves".[17] The statement pointed out that all of the facts in the F.B.I.'s possession had been turned over to District Attorney Byrne, that the question of ultimate prosecution was a matter to be worked out between United States Attorney Julian and District Attorney Byrne and that the F.B.I. would continue to make its investigative facilities available to assist prosecutive officers to the fullest extent. The release concluded with the statement in bold caps, "BACKGROUND DATA ON THOSE ARRESTED IS ATTACHED". Annexed to the release were the police and criminal records of each of those arrested. (S. pp. 39-47.)

[17] As an aside, it is interesting to note once more that all of the petitioners actually had alibi witnesses testify in their behalf.

COPY BOUND CLOSE IN CENTER

The background data showed that petitioners as a group had been convicted and served prison sentences for almost every serious crime on the books, including armed robbery, assault with intent to kill, burglary, carnal abuse of a minor child, federal income tax evasion, larceny, manslaughter, narcotics, possession of burglarious tools, possession of fire arms, and robbery. In addition to their convictions, the release showed that one of the petitioners had been arrested as a selective service violator and for a parole violation; and another for using an automobile without authority, drunkenness, contempt of court and for conspiracy. The release also showed that one had secured the dismissal of a deportation order in the United States Supreme Court and another the reversal of an illicit still conviction by a Federal Court of Appeals. Included was O'Keefe's record and the information, that in June of 1954, "Trigger" Burke, a notorious criminal who had then recently been convicted of murder in New York, had machine-gunned O'Keefe, and that Burke subsequently was charged with possession of the machine gun but escaped jail prior to prosecution.

The effect of the announcement by the Department of Justice, as well might have been anticipated by District Attorney Byrne and officials of the Department of Justice, was sensational. Its substance was broadcast and rebroadcast throughout the United States by all of the news services and by radio and television. Its impact in Massachusetts was of particular intensity. *Because of the overwhelming prestige enjoyed by Hoover, his pronouncement that the case was solved was accepted by the press and public as establishing beyond any doubt the guilt of the petitioners.* In addition, all of the newspapers carried under bold and sensational headlines statements made by the District Attorney and his assistants discussing and characterizing in detail testimony which O'Keefe, who was being held incommunicado, would give before the Suffolk

County grand jury (S. pp. 12-25); telling why O'Keefe had confessed and the contents of his confession; linking McGinnis with the murder of Carleton O'Brien of Rhode Island, Pino with the escape from the Charles Street jail of "Trigger" Burke, the Brink's robbery with the death of George O'Brien, acquitted by a Federal District Court in the much publicized Danvers, Massachusetts, larceny, the Brink's robbery with the disappearance of John Carlson, a South End bookie who had reportedly helped O'Keefe when machine-gunned by "Trigger" Burke, and the Brink's robbery with the unsolved murder of "Whitey" Hurwitz; and telling about the propsed bombing of O'Keefe's jail cell in order to seal his lips. The District Attorney was quoted as saying that he believed that Carlson was dead and that "Carlson disappeared a short time after he was up here to see us." Reports were also carried in the newspapers charging that key Brink's officials and other important government witnesses had been warned "not to talk" and linking the recent slaying of a man in Georgetown with the Brink's case. *Every Boston newspaper carried editorials congratulating Hoover and his organization for their accomplishment and expressing the community's gratitude for the solution of the six year old crime.* Various state and municipal officials were quoted expressing their opinion as to the great effect that the solution would have upon law enforcement. (S. pp. 21-26.) For samples of some of the pre-indictment publicity, contained in Ex. A, see Appendix C hereof, *infra*, pp. 110-123.

All of this publicity appeared during the 24 hour period immediately preceding the convening of the state grand jury on January 13, 1956. *Petitioners charged in their special pleadings and in their affidavits, and both state courts and the District Court assumed, that this massive, prejudicial, pre-indictment publicity was issued, caused and stimulated by state and federal enforcement officials, and that such news releases and statements and the widespread*

COPY BOUND CLOSE IN CENTER

and sensational publicity given them were calculated by those enforcement officials to convince the grand jury not only that petitioners were guilty, but also that they were hardened criminals of the worst sort. Petitioners claimed, and the courts assumed, that the grand jury was convinced of the petitioners' guilt even before they heard any evidence, and that such governmentally inspired publicity resulted in the return of indictments against petitioners by a prejudiced grand jury. (R. pp. 4-5; 397-401; 404-420.)

The prejudicial releases and statements which had been issued and published prior to the return of the indictments were carried after the return of the indictments, over and over again in the same or in a different form in the newspapers and on radio and television right up to the very start of the trial.

In addition, news articles appeared, quoting the District Attorney or his assistants to the effect that petitioners "after importing Burke to ambush O'Keefe, had to spring him from jail to make sure he didn't talk"; that "a second member of the Brink's gang had indicated a willingness to talk" and had made admissions confirming O'Keefe's confession; that "gangland had plotted a repetition of the bold delivery of Burke" from the Charles Street jail, as a result of which petitioners were shifted to different jails; that at least five persons who knew too much about the Brink's robbery were slain because of their knowledge and were buried in the sands of Cape Cod; that gambler Joseph Venuti who had just committed suicide had been entrusted with $100,000 of the loot by McGinnis; that O'Keefe had been offered a substantial sum of money to keep quiet about the Brink's case; that Carlson had been killed "because O'Keefe had told him details of the Brink's case"; that the gang who brought "Trigger" Burke to Boston to wipe out O'Keefe promised Burke that if he were jailed, they would get him out and then support him in style, and that the Brink's gang actually did get him out of jail and sup-

port him in style on the Brink's loot; that O'Keefe had been placed under a twenty-four hour special machine gun guard as the result of the invasion of Boston by four known New York killers who were hired to silence O'Keefe; and that these same out-of-town gunmen came here to raise a defense fund for the Brink's bandits and to intimidate witnesses who had been questioned by the District Attorney.

J. Edgar Hoover issued a statement which was carried in all the newspapers condemning the "coddling" of hardened criminals such as the Brink's robbers who "find it so easy to get out of prison before the expiration of their terms, only to turn up in the headlines again with new crimes running the whole range of violence and horror". His statement was approved editorially by Massachusetts newspapers generally. During the latter part of June, there was a deluge of stories based on statements issued by the District Attorney's office that William Cameron, whose body had been found on June 11th, with two bullets in his head, had just furnished District Attorney Byrne and other officials with "information" relevant to the Brink's robbery; and that authorities were convinced his murder was an aftermath of the Brink's robbery. In July and in the first week in August stories began to appear, on the very eve of the trial, that key government witnesses were missing and were "being fearfully sought by the F.B.I."; and that "a mysteriously missing star witness in the Brink's case was believed by officials yesterday to have been killed to prevent his testifying at the trial".[18] For samples of some of the pre-trial publicity, contained in Exhibits A-E, see Appendix C hereof, *infra*, pages 123-157.

Petitioners charged in their special pleadings and in their affidavits, and both state courts and the District Court assumed, that this massive, sustained, prejudicial, pre-trial

[18] Many of the pre-trial stories which appeared in the newspapers were also reported, although in a summarized form, on television and radio.

COPY BOUND CLOSE IN CENTER

publicity was issued, caused and stimulated by state and federal enforcement officials; that such releases and statements appeared continuously "under large and sensational headlines in great detail in every newspaper published in Boston and in every newspaper published not only elsewhere in Massachusetts but throughout the nation"; that such releases and statements appeared frequently "in magazines having substantial circulations in Massachusetts and throughout the nation"; that such news releases and statements, or detailed summaries thereof, were "continuously broadcast and televised over radio and television stations; that such news releases and statements and the widespread publicity given them were calculated and did tend "to convince any petit jury which would be selected to try petitioners not only that petitioners were guilty but also that petitioners were criminals of the worst sort who wouldn't hesitate to murder in order to escape conviction. (S. pp. 18-19; R. pp. 5-7; 397-401; 404-420.)

Reasons For Granting The Writ

I. *It is a violation of the Due Process Clause of the Fourteenth Amendment for a State, which initiates prosecutions by grand jury indictments, to require those accused of crime to stand trial on indictments which were returned by a grand jury whose members have been prejudiced by massive, prejudicial pre-indictment publicity, especially where such prejudicial publicity has been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the grand jury.*[19]

Petitioners' first contention pre-supposes that there is a federal constitutional right to be indicted, if at all, by state

[19] This is the same issue as the first issue raised in *Beck* v. *State of Washington*, 365 U.S. 866, 81 S. Ct. 900.

grand jurors free of calculated, governmentally instigated prejudice. It is based upon the allegations in petitioners' petition for a writ of habeas corpus that state and federal enforcement officials issued, caused and stimulated massive, prejudicial pre-indictment publicity, calculated and tending to convince the grand jury of petitioners' guilt and to arouse that grand jury's animosity, indignation and prejudice toward and against petitioners, and that such publicity convinced the grand jury of petitioners' guilt and resulted in the return of indictments against petitioners by a prejudiced grand jury. (R. pp. 4, 5) The same allegations, in almost precisely the words used in their petition for a writ of habeas corpus, were made in the special pleadings by which petitioners sought to abate or quash the indictments in the Superior Court. (S. pp. 15-19, 48-51, 52-56; R. p. 412.) [20] Those allegations were not only supported by affidavit and by many prejudicial newspaper articles (S. pp. 19-47),[21] but were also assumed to be true by the Massachusetts trial judge and Supreme Judicial Court, by the District Court and by the court below which adopted the District Court's opinion (R. pp. 409, 410, 412; Appendix A hereto, *infra*, p. 68.)[22]

---

[20] A plea in abatement or motion to quash is the proper way for challenging the grand jury selection, *Pierre* v. *State of Louisiana*, 306 U.S. 354, 59 S. Ct. 536; *Cassell* v. *State of Texas*, 339 U.S. 282, 70 S. Ct. 629; *Reece* v. *State of Georgia*, 350 U.S. 85, 76 S. Ct. 167; *Eubanks* v. *State of Louisiana*, 356 U.S. 584, 76 S. Ct. 970.

[21] Professor Arthur Sutherland in an article entitled *Crimes, Courts and Newspapers*, appearing on page 39 in the April, 1956, issue of the *Nieman Reports*, seriously doubted at page 41 "whether the Grand Jurors in this case were in a position to give consideration to the evidence presented before them if they had previously read the conclusion of the Boston papers".

[22] As a matter of fact, the Commonwealth conceded on page 9 of the brief which it filed in the Massachusetts Supreme Judicial Court that its motion to dismiss petitioners' special pleadings could "be treated as recognizing an issue as though raised by a demurrer *ore tenus*". This Court must also assume the truth of the allegations for two added reasons: (1) petitioners had offered to prove their allegations and

The District Court, in agreeing with the Massachusetts Supreme Judicial Court that there was no such federal constitutional right, reasoned first, that the federal constitution did not require state prosecutions to be instituted by indictments of grand juries; second, that an indictment was only a charge, it was not evidence; and finally, that no reasonable person would suppose that a conviction by an impartial petit jury at a fair trial should be set aside for federal constitutional reasons merely because the indictment under which the conviction was obtained had been returned by "a grand jury which responded to massive publicity inspired by the district attorney". (R. p. 410.)[23] But these very reasons have been considered and rejected by this Court in closely analogous situations.

First of all, the judicial construction that the Fourteenth Amendment does not necessarily require state prosecutions to be instituted by indictments of grand juries, *Hurtado* v. *State of California,* 110 U.S. 516, 4 S. Ct. 111; *Kennedy* v. *Walker,* 337 U.S. 901, 69 S. Ct. 1046, has never deterred this Court from setting aside a state court conviction solely on the ground that it was commenced by an indictment returned by a grand jury from which Negroes had been intentionally excluded. *Pierre* v. *State of Louisiana,* 306 U.S. 354, 59 S. Ct. 536; *Cassell* v. *State of Texas,* 339 U.S.

---

their offer had been refused, *cf. Lambert* v. *State of California,* 355 U.S. 225, 227, 78 S. Ct. 240, 242; and (2) "had there been evidence obtainable to contradict and disprove the testimony offered by (petitioners) . . . , the State would (not) have refrained from introducing it," *Pierre* v. *State of Louisiana,* 306 U.S. 354, 361-369, 59 S. Ct. 536, 540. See also, *Reynolds* v. *Cochran,* 365 U.S. 525, 527-528, 81 S. Ct. 723, 724-725.

[23] The District Court also doubted that a person's conviction by an impartial trial jury would be held to be in violation of the federal constitution merely because the charge considered by that petit jury was an information drawn by a prosecutor who had been prejudiced by massive publicity. This "straw man" is, of course, entirely irrelevant; but see *State* v. *Tate,* 185 La. 1006, 171 So. 108; *State* v. *Jones,* 306 Mo. 437, 268 S.W. 83; *Hall* v. *State,* 24 Okla. Cr. 197, 217 Pac. 229.

282, 70 S. Ct. 629; *Reece* v. *State of Georgia,* 350 U.S. 85, 76 S. Ct. 167; *Michel* v. *State of Louisiana,* 350 U.S. 91, 76 S. Ct. 158; *Eubanks* v. *State of Louisiana,* 356 U.S. 584, 78 S. Ct. 970. Nor has the Court been reluctant to set aside a state court conviction because of unfair appellate procedures, even though the Fourteenth Amendment has never been construed to require a state "to provide appellate courts or a right to appellate review at all." *Griffin* v. *People of the State of Illinois,* 351 U.S. 12, 18, 76 S. Ct. 585, 590; *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214, 78 S. Ct. 1061; *Burns* v. *State of Ohio,* 360 U.S. 252, 79 S. Ct. 1164; *Douglas* v. *Green,* 363 U.S. 192, 80 S. Ct. 1048. Thus it seems clear that the Fourteenth Amendment protects persons like petitioners from all sort of invidious acts at every stage of the proceedings—from the very beginning to the end—even during a stage not required by constitutional due process. As a matter of fact, in *Frank* v. *Mangum,* 237 U.S. 309, 35 S. Ct. 582, the Court said, 237 U.S. at page 327, 35 S. Ct. at 587, "(W)hile the 14th Amendment does not require that a State shall provide for an appellate review in criminal cases . . . , it is perfectly obvious that where such an appeal is provided for, . . . the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which (the prisoner) . . . is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

Second, this Court has already rejected, as a reason for upholding an indictment returned by a grand jury from which Negroes had been excluded, the argument that " 'the Constitutional rights of the defendant (are) . . . not affected by reason of the fact that persons of the Colored . . . race are not placed on the Grand Jury because . . . the mere presentment of an indictment is not evidence of guilt . . . it

simply informs the court of a commission of a crime and brings the accused before the court for prosecution' ". In spurning that argument, this Court noted that the Louisiana constitution provided that "no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury, . . . "; and that the Louisiana law prohibits the exclusion of qualified Negroes from service on grand and petit juries. *Pierre* v. *State of Louisiana,* 306 U.S. 354, 356-358, 59 S. Ct. 536, 538. Similarly, in Massachusetts, the general rule is that no person shall be held to answer for a felony unless upon indictment by a grand jury, art. 12 of the Declaration of Rights of the Massachusetts Constitution; *Jones* v. *Robbins,* 74 Mass. (8 Gray) 329; *DeGolyer* v. *Commonwealth,* 314 Mass. 626, 627, 51 N.E. 2d 251, 252; and it is unlawful for a prosecutor to "attempt to influence the grand jurors in the performance of their duties," *Attorney General* v. *Pelletier,* 240 Mass. 264, 307-310, 134 N.E. 407, 419-420. In Massachusetts, as in Louisiana, the guarantee of indictment by a properly constituted grand jury is a basic safeguard. Certainly the reason assigned by the District Court, that an indictment "is only a charge, (which) . . . merely puts the accused to trial, (and) . . . is not evidence" (R. p. 410), is neither different nor more tenable than the reason which was discarded in *Pierre* v. *State of Louisiana,* 306 U.S. 354, 356-358, 59 S. Ct. 536-538.

Finally, all of the reasons of the District Court, in holding that there was no such federal constitutional right so long as the accused receives a trial by a fair petit jury, must have been considered and rejected in *Cassell* v. *State of Texas,* 339 U.S. 282, 70 S. Ct. 629. It is true, of course, that the rejection of that argument occurred in a case in which a state indictment was attacked by a negro defendant because of the intentional exclusion of Negroes from the grand jury. Nevertheless, the reason for such rejection

is equally valid here. Moreover, the danger of the return of a groundless indictment against an innocent person is at least as great in the case of a grand jury, calculatedly prejudiced by the extra-judicial acts of the prosecutor as it is in the case of an intentionally limited all-white grand jury considering charges against a Negro. If the implied prejudice in the latter case can be held to be constitutionally sufficient to justify the setting aside of a Negro's conviction in a state court, the actual prejudice which was assumed to have existed in the case at bar would certainly warrant similar action even though petitioners are not Negroes.

Petitioners recognize that the mere fact that the reasons of the District Court for its conclusion are untenable does not necessarily mean that its conclusion is erroneous. However, petitioners believe that its conclusion is equally untenable and that there are compelling reasons for holding, that if a State employs a grand jury, the Fourteenth Amendment calls for an unbiased grand jury.

First of all, the Fifth Amendment to the federal constitution not only requires federal prosecutions for serious crimes to be instituted by indictment, but also guarantees due process of law to all federal prisoners. It must have been the due process clause of that amendment which this Court had in mind in *Costello* v. *United States,* 350 U.S. 359, 363, 364, 76 S. Ct. 406, 409; *Lawn* v. *United States,* 355 U.S. 339, 349, 78 S. Ct. 311, 317, when it said in effect that the Fifth Amendment calls for an indictment returned not only by a legally constituted grand jury, but also by an unbiased grand jury.

Moreover, Mr. Justice Black, with whom Chief Justice Warren and Mr. Justice Douglas concurred, spelled out the constitutional right in a dissent in *Michel* v. *State of Louisiana,* 350 U.S. 91, 76 S. Ct. 158. There he said at pages 102-104 of 350 U.S., 76 S. Ct. at 165-166, that every person has a constitutional right *"to have the charges against*

(him) . . . considered by a fair and legal grand jury". Every person has the *"federally guaranteed right to have his case considered by an unpacked grand jury".* No person can be constitutionally convicted *"until after adequate notice and a fair trial on an indictment returned by a fair grand jury selected without regard to race or color". "Under our system even a bad man is entitled to have his case considered at every stage by a fair tribunal."* (Italics Supplied.) Although Mr. Justice Black was discussing at one point federal prosecutions, what he said applied to both state and federal prosecutions.

Furthermore, if the Due Process Clause in the Fifth Amendment requires an unbiased grand jury, then the Due Process Clause of the Fourteenth Amendment imposes the same requirement. For, as Mr. Justice Frankfurter said in a concurring opinion in *Malinski* v. *People of State of New York,* 324 U.S. 401, 415, 65 S. Ct. 781, 788, "to suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection."

Secondly, several Justices of this Court have recognized that every person has a right, guaranteed by the Fourteenth Amendment, to have the state charges against him, if presented to a state grand jury, considered by a fair and impartial grand jury.

In *Cassell* v. *State of Texas,* 339 U.S. 282, 70 S. Ct. 629, the state court's conviction of Cassell, a Negro, was reversed because the number of Negroes selected for grand jury duty had been intentionally limited in approximate proportion to the number of Negros eligible for grand jury service. Realizing, no doubt, that it would be difficult logically to support reversal under the equal protection clause, for, if anything, selection on that basis would tend to provide mathematically equal treatment, Mr. Justice Reed commenced his opinion, concurred in by Chief Justice

Vinson and Justices Black and Clark, by stating, *"Review was sought in this case to determine whether there had been a violation by Texas of petitioner's federal constitutional right to a fair and impartial grand jury"*. (Italics supplied.) Mr. Justice Jackson also must have considered the issue to be the petitioner's constitutional right to an impartial grand jury, for in his dissent, he argued unsuccessfully, just as the District Court reasoned incorrectly, that since Cassell had been convicted by a fair trial jury, he could not possibly have been prejudiced by the grand jury and he, therefore, had no right to an impartial grand jury.

In *Michel* v. *State of Louisiana*, 350 U.S. 91, 102, 76 S. Ct. 158, 165, where this Court held that two of the petitioners had waived their constitutional rights by not seasonably challenging the composition of the grand jury indicting them, and that the third petitioner had forfeited his constitutional right by fleeing from the State and remaining away until long after the expiration of the time allowed by state law to challenge the validity of the grand jury, the three dissenters, Mr. Justice Black, joined by Mr. Chief Justice Warren and Mr. Justice Douglas, criticised the majority for holding that, because the petitioners had failed to make a timely challenge to the composition of the grand jury indicting them, they waived "their constitutional and statutory rights to have the charges against them considered by a fair and legal grand jury". In doing so, the dissenters, of course, recognized the federally guaranteed right to an unbiased grand jury.

Thus it is seen from the *Cassell* and *Michel* cases that at least seven Justices of this Court, including four of the present members, have said, or have joined in saying in one way or another, that every person has the right, guaranteed by the Fourteenth Amendment, not to be indicted by a prejudiced state grand jury.

COPY BOUND CLOSE IN CENTER

Finally, the notion that a prosecutor may purposely prejudice a state grand jury with complete constitutional immunity is certainly a concept that is foreign to our standards of decency and fairness. As was said in *Costello* v. *United States,* 350 U.S. 359, 362, 76 S. Ct. 406, 408, the very purpose of the grand jury procedure is "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes."

Its object, according to *Stirone* v. *United States,* 361 U.S. 212, 218, 80 S. Ct. 270, 273, is to limit a person's jeopardy "to offences charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge". It was "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity". *Ex parte Bain,* 121 U.S. 1, 11, 7 S. Ct. 781, 786. See also *Costello* v. *United States,* 350 U.S. 359, 362, 76 S. Ct. 406, 408; 2 Wharton, *Criminal Procedure* (1918) 1757; 38 C.J.S. 983. In *Jones* v. *Robbins,* 74 Mass. (8 Gray) 329, 344, Chief Justice Shaw said: "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." See also to the same effect *Attorney General* v. *Pelletier,* 240 Mass. 264, 307-310, 134 N.E. 407, 419-420; *DeGolyer* v. *Commonwealth,* 314 Mass. 626, 627, 51 N.E. 2d 251, 252; *Blake* v. *State,* 54 Okla. Cr. 62, 67-70, 14 P. 2d 240, 242-243.

Moreover, the jealously with which the safeguard has

been sedulously preserved is well demonstrated by the following cases in each of which the conviction was reversed because of the prosecutor's influence upon the deliberations of the grand jury. *Williams* v. *State,* 188 Ind. 283, 303-307, 123 N.E. 209, 216-217; *State* v. *Crowder,* 193 N.C. 130, 136 S.E. 337; *Blake* v. *State,* 54 Okla, Cr. 62, 14 P. 2d 240; *Hammers* v. *State,* Okla., 337 P. 2d 1097. See also *Attorney General* v. *Pelletier,* 240 Mass. 264, 307-310, 134 N.E. 407, 419; 38 C.J.S. 1042.

In the instant case, the prosecutor influenced the grand jury by prejudicial publicity, calculatedly issued or inspired by him. That the grand jury was obviously influenced by such publicity is revealed by Professor Sutherland's contemporaneous observation in an article entitled *Crimes, Courts and Newspapers,* which appeared in the April, 1956, issue of the *Nieman Reports,* pp. 39-41:

> "The Boston Herald for Friday, January 13, 1956, carried as a headline running entirely across the top of the page the words: 'BRINK CASE SOLVED, O'KEEFE KEY F.B.I.: THIS IS HOW IT HAPPENED.' Then came photographs of six men, with the names in conspicuous type under each, and under the photographs (was) another headline running entirely across the page 'SIX BANDITS PUT IN JAIL HERE.'
>
> "Curiously, however, the right hand two columns carried the headline 'Suffolk (Grand) Jurors To Act Today,' which, one supposes, indicates that there was something for the jurors to consider. . . . *a question immediately arises in the mind of a lawyer as to whether the Grand Jurors in this case were in position to give consideration to the evidence presented before them.* . . . " (Italics supplied.)

Professor Sutherland's meaning is unmistakable.

To permit the district attorney to influence a grand jury by prejudicial publicity, calculatedly issued or instigated by him, would make a mockery of the very purpose of the grand jury procedure. It would reduce that procedure to a mere sham or pretense.

Petitioners know from the teachings of this Court that the securing of a guilty verdict by the intentional use of perjured testimony, *Mooney* v. *Holohan*, 294 U.S. 103, 55 S. Ct. 340; *Napue* v. *State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173, or by intimidation, *Frank* v. *Mangum*, 237 U.S. 309, 35 S. Ct. 522, or by massive publicity, *Irvin* v. *Dowd*, 359 U.S. 394, 79 S. Ct. 825; 81 S. Ct. 1639, stimulated by the prosecutor, is constitutionally abhorrent.

In petitioners' opinion, the contrivance by a State to procure an indictment against a person by the knowing use of perjured testimony or by duress or by massive prejudicial publicity, deliberately inspired by the prosecutor, is just as inconsistent with the rudimentary demands of justice. Due process, as was said in *Griffin* v. *People of the State of Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590, requires fairness at every stage of the proceedings.

For all of the foregoing reasons, petitioners believe that a person under investigation by a grand jury "is as much entitled to the just, impartial and unbiased judgment of that body as he is to that of the petit jury on his final trial", 24 Am. Jur. 861; and petitioners believe that a person who has been indicted by a state grand jury, prejudiced against him by massive publicity, calculatedly issued and stimulated by the prosecutor, has been denied the due process of law guaranteed him by the Fourteenth Amendment to the Federal Constitution. See *State* v. *Beck*, 155 Wash. Dec. 565, 349 P. 2d 387, 353 P. 2d 429, *cert. granted*, 365 U.S. 866, 81 S. Ct. 900.

II. *It is a violation of petitioners' right to a fair and impartial trial, under the Fourteenth Amendment, for the trial judge to require them, over their objections, to stand trial at a time when the prejudicial publicity, which had been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the petit jury, "was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time".*[24]

The second issue is based upon the allegations in petitioners' petition for a writ of habeas corpus that state and federal enforcement officials, acting cooperatively, had issued, caused and stimulated massive, sustained, prejudicial pre-trial publicity, calculated and tending to convince the petit jury, returning the guilty verdicts, of petitioners' guilt and to arouse that petit jury's animosity, indignation and prejudice toward and against petitioners; and that such publicity convinced the petit jury of petitioners' guilt and resulted in the return of guilty verdicts against petitioners by a prejudiced petit jury. (R. pp. 6-7) Substantially the same charges were made by petitioners in the special pleadings which they filed in the Massachusetts Superior Court, again at the times when they objected to the setting of the trial date and to proceeding with trial, and still again at the time they presented their motions in that court for leave to conduct a voir dire examination of the prospective petit jurors and for the trial judge to put the questions listed in their Motion for Questions to Jurors to each prospective juror. (S. pp. 15-19, 48-51, 52-56, 78-81; R. pp. 76-79, 96-102, 412.) Their allegations were sup-

[24] Appendix A hereto, *infra*, p. 71.

ported by affidavit and literally hundreds of prejudicial news articles. (S. pp. 19-47, 82-83; Exhibits A-E.)

Both Massachusetts courts and the District Court assumed that petitioners could prove that state and federal enforcement officials had calculatedly[25] released for publication detailed accounts setting forth that the Brink's robbery had been solved, that petitioners together with other defendants had planned and committed the crime, that petitioners had prepared alibis in advance, how the robbery was solved, how the robbery was planned and committed by petitioners together with other defendants, what the criminal and police record of each petitioner was, that petitioners had committed other unrelated serious crimes, that petitioners were linked with the unrelated disappearance, murder, kidnapping or escape from jail of other criminals, that some of the defendants had confessed, that petitioners had set aside $200,000 from the stolen money as a defense fund, and that petitioners were linked with an attempt to murder O'Keefe, the government's star witness, or with the disappearance of other key government witnesses. Both of the Massachusetts courts and the District Court also assumed that all of the various media of publicity had used those releases and other information which had been inspired by the District Attorney and other officials to print extensive and continuous accounts in the press and for radio and television newscasts. (R. pp. 412-414.) The Court of Appeals also acknowledged that there was certainly some basis for petitioners' "assertion that the prejudicial publicity was so widespread and continuous that the defendants would fare no better in any other

[25] "Even though the (prosecutor) may not have had a provable desire, the specific intent, to affect the pending trial and its outcome, are we really required to attribute to the (prosecutor) a child-like unawareness of the inevitability that (his) remarks would be reported and find their way to judge or jury, as they did?" Frankfurter, J., dissenting, in *In re Sawyer*, 360 U.S. 622, 664, 79 S. Ct. 1376, 1397.

county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time". (Appendix A hereto, *infra*, p. 71.)

The District Court, in agreeing with the Massachusetts Supreme Judicial Court, held that the state jury trial, although "conducted in the face of publicity of the type assumed to have been present . . . and . . . to have been stimulated by the prosecutor, was (not) a violation of the Due Process Clause of the Fourteenth Amendment warranting a federal court in relieving a state prisoner from a state court judgment." In arriving at its decision, the District Court acknowledged that "undoubtedly excessive publicity justifies and may require a long postponement of the trial upon defendant's request, or a change of venue upon defendant's request, or a more than perfunctory voir dire examination of potential jurors"; stated that ordinarily the usual safeguards, "a motion to postpone the trial, a motion for change of venue and a careful voir dire scrutiny of each juror as he is called" would suffice to protect a "defendant whose right (to a fair trial) was abused by publicity"; established the principle "that a federal court should consider whether a petitioner is entitled to be relieved of a state judgment on the ground of prejudice caused by publicity" only after first being satisfied "that one of those safeguards has been denied"; and then concluded that because petitioners had deliberately "failed to move for a continuance or to move for a change of venue and had the benefit of a fairly conducted voir dire examination of the jury which tried them", none of the usual safeguards had been denied to petitioners. (R. pp. 416-418.) In this, the District Court was wrong.

A. *The constitutional irrelevance of petitioners' failure to move for a change of venue or a continuance*

Contrary to the view of the District Court, petitioners'

deliberate failure to move for a change of venue or to request a continuance cannot be construed as a waiver of or fatal to their federal constitutional right to a fair and impartial jury.

First of all, the contention that the prejudicial publicity had prevented a fair trial was not an after-thought, as in *Stroble* v. *State of California*, 343 U.S. 181, 72 S. Ct. 599; and *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 76 S. Ct. 965. Stroble did not raise that issue until after his conviction; Darcy not until almost three years after his trial. In both of those cases this Court emphasized as significant that each was represented by competent counsel who, in the case of *Stroble*, "saw no occasion to seek a transfer of the action to another county," 343 U.S. 181, 194, 72 S. Ct. 599, 605, and in the case of *Darcy*, "did not use all of his peremptory challenges after a searching examination of prospective jurors on *voir dire*, and did not seek a continuance of the trial or a change of venue", 351 U.S. 454, 463, 76 S. Ct. 965, 970. There, as indicated by this Court, vigorous, experienced counsel thought so little of the possible effect of the publicity upon the jury that they did not even bother to raise any issue involving publicity until some time after conviction.[26] Here, on the other hand, petitioners contended from the very beginning, even long before their trial, that the massive, sustained, prejudicial publicity, calculatedly inspired by the prosecutors, had deprived petitioners of their state and federal constitutional right to a fair and impartial grand jury and to a fair and impartial petit jury; and they exhausted all of

[26] The record in *Stroble* indicates that the two deputy public defenders who vigorously defended Stroble throughout the trial challenged only one prospective juror and asked no questions concerning publicity on their voir dire examination of jurors. According to the record, Darcy's competent counsel, although conducting "a searching examination of prospective jurors on voir dire", saw no occasion to challenge even one juror.

their 262 peremptory challenges to avoid the implication suggested by Mr. Justice Burton's statement in *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 463, 76 S. Ct. 965, 970, that "the failure of petitioner's counsel to exhaust the means provided to prevent the drawing of an unfair trial jury from a community allegedly infected with hysteria and prejudice against petitioner, while not dispositive, is significant." *Cf. Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 115-116.

Second, there was no reason to believe, as petitioners had consistently maintained, that there was any place in Massachusetts which had escaped the "fall out" of the prejudicial publicity. *Irvin* v. *Dowd*, 81 S. Ct. 1639, 1642; *Id.*, 7 Cir., 271 F.2d 552, 554-555; *Singer* v. *State of Florida*, Fla., 109 So. 2d 7, 14. Moreover, as was pointed out in *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 116, "the right to apply for a change of venue is given for the defendant's benefit and at his option. He is not obliged to forego his constitutional right to an impartial trial in the district wherein the offense is alleged to have been committed; and under the circumstances of this case we do not think that the defendant's appeal stands any worse for failure on his part to apply for a change of venue."

Third, it cannot be seriously argued that petitioners would only be entitled to a fair trial if they would request a continuance to some uncertain future date when it might be said that the prejudicial effects of the publicity had sufficiently faded and would agree, if their request were granted, to continue to languish in jail, remain on the tenterhooks of their uncertain future and run increasingly greater risks that their witnesses might become unavailable or lose their memories—the very evils which the constitutional requirement of a speedy trial seeks to prevent. Here, five of the petitioners were remanded to jail on January 16, 1956, when they were arraigned, because of an inability

to furnish what they submit was excessive bail; the other two were confined for the same reason on May 17, 1956, when they were arraigned.[27] At the time of their arraignment, six years had elapsed since the commission of the crimes with the result that there was a strong possibility that any witnesses who might have proved their innocence had long since disappeared or forgotten the circumstances. And yet the trial judge insisted that petitioners surrender their constitutional right to a speedy trial before he would consider any request for a continuance.[28] Certainly petitioners were entitled, as are all prisoners, to all three of the constitutional guarantees—the right to a speedy, fair and local trial; and they need not surrender the first and third of those rights in order to secure the second. *Cf. Delaney* v. *United States,* 1 Cir., 199 F.2d 107, 116. Nor could they be expected to waive their statutory right to be bailed on their own recognizance as a prerequisite to the trial judge's consideration of any need for a continuance.

Fourth, judges are not mere umpires who must sit on the bench, mute and inert, until called upon to make a ruling. To fulfill their duty, they "must take charge of the trial. They cannot 'stand by'. They, rather than counsel, are responsible for respect-inspiring verdicts by juries, and for favorable public opinion which an orderly, intelligent, well-directed trial inspires. Ruling upon the admission of evidence, pronouncing certain stereotyped rules of law

---

[27] Petitioners, shortly after being remanded to jail because of an inability to make bail in the amount set, applied to the Superior Court for a writ of habeas corpus contending that the bail of $200,000 with double sureties under which they were held was excessive. Their applications were denied. See, for example, Superior Court for Suffolk County, civil docket nos. 500211-500213.

[28] The trial judge had also stated in chambers that any request for a continuance would be construed by him as a waiver of the right of petitioners (those in custody since January 13, 1956, because of an inability to make bail) to be bailed on their own recognizance under Mass. G.L. (Ter. Ed.) c. 277, s. 72.

which define reasonable doubt, presumptions of innocence, and the quantum of proof necessary to convict, do not meet this obligation. It rests with the court to see that the trial of a criminal case (or a civil action) results in the finding and pronouncement of the truth." *Pfaff* v. *United States*, 7 Cir., 85 F.2d 309, 311; *Quercia* v. *United States*, 289 U.S. 466, 469, 53 S. Ct. 698, 699; *Daley* v. *United States*, 1 Cir., 231 F.2d 123, 130, *cert. denied*, 351 U.S. 964, 76 S. Ct. 1028; *Carrado* v. *United States*, D.C. Cir., 210 F.2d 712, 722, *cert. denied*, 350 U.S. 938, 76 S. Ct. 310; *Simon* v. *United States*, 4 Cir., 123 F.2d 80, 83, *cert. denied*, 314 U.S. 694, 62 S. Ct. 412; *United States* v. *Lee*, 7 Cir., 107 F.2d 522, 529-530, *cert. denied*, 309 U.S. 659, 60 S. Ct. 513. In the instant case, unlike *Stroble* v. *State of California*, 343 U.S. 181, 72 S. Ct. 599; and *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 76 S. Ct. 965, the trial judge's attention had been forcefully and repeatedly directed to the massive, sustained, prejudicial pre-trial publicity, calculatedly inspired by the prosecutors. He had been informed by petitioners that they would proceed to trial only when ordered to do so over their objection that they could not, because of the prejudicial publicity, obtain a fair trial. It was his duty to postpone the trial until such time as there was reasonable assurance that the prejudicial effects of the publicity had abated.

Moreover, the Court of Appeals conceded the irrelevance of petitioners' failure to move for a change of venue or a continuance, when it said: "(S)ince there is certainly some basis for counsels' assertion that the prejudicial publicity was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time, it seems to us that for the purposes of this particular appeal *the defendants should stand no worse for their counsels' failure to ask for . . . a*

change of venue or a continuance." (Appendix A hereto, *infra*, p. 71.) (Emphasis supplied.)

B. *The unfairness of holding the trial before the prejudicial effects of the publicity had abated*

There was no assurance on August 6, 1956, when petitioners were brought to trial over their objection, "that the prejudicial effect of the aforesaid publicity in the newspapers and magazines, over the radio and on television, had so far worn off that the trial could proceed free of the enveloping hostile atmosphere and public preconception of guilt." *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 112. In point of fact, every available sign clearly established that the massive, sustained, prejudicial publicity continued right up to the start of the trial and would prejudice any petit jury selected to try petitioners.

1. Not only did petitioners' first and second special pleadings and their first and second affidavits so allege, and the newspaper articles contained in Exhibits A, B, C, D and E so demonstrate, but the Massachusetts courts assumed the truth thereof.[29] The District Court also assumed that petitioners could prove that the prejudicial publicity continued right up to the start of the trial. (R. pp. 412-415.) And, as already indicated, the court below acknowledged that there was certainly some basis for the petitioners' "assertion that the prejudicial publicity was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time." (Appendix A hereto, *infra*, p. 71.)

2. The Superior Court trial judge's action in directing

[29] Furthermore, the Commonwealth conceded on page 9 of the brief which it filed in the Massachusetts Supreme Judicial Court that its motion to dismiss petitioners' special pleadings could "be treated as recognizing an issue as though raised by a demurrer *ore tenus*."

that two thousand persons be summoned for possible jury duty in this case demonstrated that he himself realized that because of the prejudicial publicity, he would experience considerable difficulty in selecting impartial jurors.

3. It should be assumed that all of the veniremen had read or heard the extra-judicial prejudicial reports prior to their acceptance for jury duty. *Irvin* v. *Dowd*, 81 S. Ct. 1639, 1642; *Holt* v. *United States*, 218 U.S. 245, 251, 31 S. Ct. 2, 5; *Irvin* v. *Dowd*, 7 Cir., 271 F.2d 552, 554-555; *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 112-113; *Griffin* v. *United States*, 3 Cir., 295 Fed. 437, 440; *Meyer* v. *Cadwalader*, E.D. Pa., 49 Fed. 32, 36, *reversed on other grounds*, 3 Cir., 89 Fed. 963, *cert. granted*, 172 U.S. 648, 19 S. Ct. 883, *dismissed*, 22 S. Ct. 932; *Basiliko* v. *State*, 212 Md. 248, 264, 129 A. 2d 375, 383; *People* v. *Murawski*, 394 Ill. 236, 241, 68 N.E. 2d 272, 274; *Commonwealth* v. *Trefethen*, 157 Mass. 180, 196, 31 N.E. 961, 967. As was said in *Singer* v. *State of Florida*, Fla., 109 So. 2d 7., 14, it would be difficult to find any place "in which the residents thereof had not heard or read of the crime and formed opinions thereof." But more importantly, the trial judge's rejection of petitioners' offer to prove that each venireman had read or heard such prejudicial publicity "'cannot be brushed aside.' Had there been evidence obtainable to contradict and disprove the testimony offered by (petitioners) . . . , it cannot be assumed that the State would have refrained from introducing it." *Pierre* v. *State of Louisiana*, 306 U.S. 354, 361-362, 59 S. Ct. 536, 540.

4. The voir dire examinations of 1104 prospective jurors, conducted by the trial judge in a manner, petitioners say, not especially designed to elicit the existence of prejudice, forcefully demonstrated the effect of the publicity. Four hundred twenty-six veniremen insisted that they had strong or firmly fixed opinions and were, of course, excused for prejudice. One hundred thirty-three other veniremen, in-

cluding two who served on the jury returning the guilty verdicts, admitted having opinions of varying degrees, but testified that they could decide the case purely on the evidence. Their statements that they would not be influenced by any preconceived opinions were apparently accepted as conclusive by the trial judge (but see *Irvin* v. *Dowd,* 81 S. Ct. 1639, 1645; Black, J., dissenting in *Dennis* v. *United States,* 339 U.S. 162, 176, 70 S. Ct. 519, 527; *Singer* v. *State of Florida,* Fla., 109 So. 2d 7, 24; *People* v. *Hryciuk,* 5 Ill. 2d 176, 183-185, 125 N.E. 2d 61, 65-66), even though many of them were undoubtedly not so endowed with such a sense of detachment that they could exclude the unconscious influence of their preconceptions as to probable guilt, *Delaney* v. *United States,* 1 Cir., 199 F.2d 107, 112-113; *People* v. *Hryciuk,* 5 Ill. 2d 176, 183-185, 125 N.E. 2d 61, 65-66. Two hundred thirty-nine veniremen were excused for ill health, hardship, and other reasons, ofttimes before they were questioned about prejudice or bias. The remaining prospective jurors, including the ten other jurors participating in the return of the verdicts, denied the existence of any opinion or bias. Their denials were apparently accepted as conclusive although "where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight," *Irvin* v. *Dowd,* 81 S. Ct. 1639, 1645, and "persons most affected with bias or prejudice are sometimes at least sensible of it," *Commonwealth* v. *Trefethen,* 157 Mass. 180, 195-196, 31 N.E. 961, 967; cf. *Globe Newspaper Company* v. *Commonwealth,* 188 Mass. 449, 453, 74 N.E. 682, 684.

The Court of Appeals deemed these statistics unimpressive, especially when compared with those in *Irvin.* (Appendix A hereto, *infra,* pp. 73-74.) But overlooked were certain vital distinctions.

In *Irvin,* prospective jurors *"were fully examined in open court and . . . defense counsel participated in inter-*

rogating" them. 271 F.2d 552, 558. (Emphasis added.) They were examined as to their familiarity "with the material facts and circumstances involved, including the fact that other murders were attributed to" Irvin. Each of those who admitted having an opinion *was questioned as to what it was and as to its intensity.* "A number admitted (in response to questioning) that, if they were in the accused's place in the dock and he in their's on the jury with their opinions, they would not want him on a jury". 81 S. Ct. 1639, 1645.

In the case at bar, on the other hand, prospective jurors were not fully examined, and defense counsel were denied the opportunity of participating in the interrogation of them. None of the impanelled jurors was questioned concerning what he had read or heard about the robbery or about petitioners' participation in the robbery, or about petitioners' criminal background and connection with other crimes. None of the veniremen who admitted having an opinion was questioned as to what it was[30] or as to its intensity; and none was asked whether if the positions of the defendants and himself were reversed, he would accept as jurors the defendants if they had the same opinion of him as he had of them.

Had the trial judge permitted counsel to ask, or had he himself asked, questions of the type which were asked in *Irvin,* it seems certain that many more prospective jurors would have confessed to disqualifying opinions.

All in all, it is quite apparent that every person chosen to serve on the jury had read or heard, shortly before the

---

[30] Several volunteered their opinion. A few among those expressed the opinions that petitioners were innocent or should not be punished. (Appellees' Record Appendix in court below, pp. 435-443.) From that the court below concluded that it could "hardly assume that all those with an opinion thought the defendants guilty." (Appendix A hereto, *infra,* p. 74.) However, in the light of the barrage of publicity and the nature of the publicity, its dilemma is difficult to understand.

commencement of his jury service, how petitioners had planned and committed the robbery and how they had prepared alibis in advance; that each petitioner had a criminal and police record and what it was; that petitioners had committed other unrelated serious crimes; that petitioners were linked with the unrelated disappearance, murder, kidnapping or escape from jail of other criminals; that some of the defendants had confessed; that petitioners had set aside $200,000 from the stolen money as a defense fund; and that petitioners were linked with an attempt to murder the government's star witness and with the disappearance of other key government witnesses. Those stories have been assumed, as already demonstrated, to have been instigated by the prosecutors for that very purpose. No one from the district attorney's office ever repudiated any of those stories.

At no time during the trial did the government offer to prove what the criminal or police record of any petitioner was; or that petitioners had committed other unrelated, serious crimes; or that petitioners were linked with the unrelated disappearance, murder, kidnapping or escape from jail of other criminals. Such evidence, even if available, would have been clearly inadmissible. Any inquiry seeking to elicit such evidence would have been summarily rejected not "because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson* v. *United States,* 335 U.S. 469, 475-476, 69 S. Ct. 213, 218-219; *Commonwealth* v. *Stone,* 321 Mass. 471, 473, 73 N.E. 2d 896, 898.

Nor did the Commonwealth ever attempt to prove that any of the defendants had confessed; or that petitioners had set aside $200,000 of the stolen money as a defense fund; or that petitioners were linked with an attempt to murder the government's star witness or with the disappearance of other key government witnesses. The only rational explanations for the nonproduction of any of such evidence in court are that the stories were false or that they were obtained under circumstances which made them inadmissible or their use inexpedient. "It is hard to imagine a more prejudicial influence" than news releases issued by prosecutors containing statements of the type involved in this case. Here such statements, "unsworn to, unseen, uncross-examined and uncontradicted, (were) . . . conveyed by the press to the jury." The conclusion is inescapable that petitioners "were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated." Jackson, J., concurring, in *Shepherd* v. *State of Florida,* 341 U.S. 50, 51-52, 71 S. Ct. 549, 550.

Both federal courts seem to have discounted the prejudicial effect of the publicity because it was not susceptible, in the words of the District Court, "of arousing passion, intense emotion, or hysteria". However, petitioners do not believe that any valid distinction can be made on such a tenuous basis. Petitioners believe, as Mr. Justice Frankfurter has indicated at page 248 of his *Of Law And Men* (Elman ed. 1956), that newspapers "through headlines, spacing, repetition and characterization" can subtley infuse a reader's mind and make it responsive to fear and prejudice.

Moreover, in neither *Janko* v. *United States,* 81 S. Ct. 1662; *Marshall* v. *United States,* 360 U.S. 310, 79 S. Ct. 1171; nor *Delaney* v. *United States,* 1 Cir., 199 F.2d 107, was the publicity of a type which was likely to arouse pas-

sion or emotion or hysteria. And yet, even though the jurors gave solemn assurance in each case that they had not been prejudiced by the news articles, this Court in *Janko* and *Marshall*, and the Court of Appeals for the First Circuit in *Delaney*, held that it was unfair to subject the defendant to a trial by jurors who had been so recently exposed to prejudicial publicity. *Surely it must be agreed that the publicity in the case at bar was more massive, more sustained, and more likely to arouse prejudice than the publicity in any of those cases.*

True enough, none of those cases was decided on constitutional grounds. Nevertheless, it seems to petitioners that if a jury has been prejudiced to the extent that a federal appellate court is warranted in granting a new trial in the exercise of its supervisory power, it has also been prejudiced to the point that a new trial should be granted because of a denial of constitutional due process.

Incidentally, *Ciucci* v. *Illinois*, 356 U.S. 571, 78 S. Ct. 839, is another example where the publicity was much less prejudicial. And yet Justices Frankfurter and Harlan indicated that if news articles, attributing to the state prosecutor dissatisfaction with the prison sentence given to Ciucci and a determined purpose to prosecute until the death sentence was obtained, had been a part of the record, they would have voted to reverse because of a denial of due process.

For the reasons already indicated, *Stroble* and *Darcy* are clearly distinguishable. Moreover, in *Stroble* the confession which was released by the prosecutor to the press was introduced in evidence four days later at a preliminary hearing and at that time became public property; and the prejudicial publicity soon abated. In the instant case little of the prejudicial publicity was offered in evidence and all of it, as a mere examination of the five volumes of news articles will disclose, continued right up to the start of the trial.

Furthermore, the release of the confessions to the press in the *Irvin* case occurred eight months before the trial began. In the instant case the release of prejudicial stories occurred continuously right up to the start of the trial. Additionally, the finding of the trial judge in *Irvin* and in *People* v. *Duncan*, 53 Cal. 2d 803, 350 P. 2d 103, *cert. granted*, 363 U.S. 840, 80 S. Ct. 1639, *writ dismissed*, 366 U.S. 417, 81 S. Ct. 1356, that the jurors selected to try the defendant were impartial, is less suspect than the finding of impartiality made in the instant case. In each of those cases, unlike the case at bar, defense counsel participated in a full voir dire examination of the jurors.

For all of the foregoing reasons, petitioners believe that it was obvious on August 6, 1956, that the prejudicial effects of the governmentally inspired publicity had not worn off and that the holding of the trial at that time was a violation of constitutional due process.

III. *Where petitioners have good reason to assert that the prejudicial publicity, which had been issued, caused and stimulated by state and federal enforcement officials with calculation to prejudice the petit jury, "was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time,"* [31] *it is a violation of their right to a fair and impartial trial, under the Fourteenth Amendment, for a trial judge to refuse their offer to prove prejudice on the part of jurors, to deny their motion for leave to conduct a voir dire examination of jurors, to refuse to put questions suggested by them to jurors, and then to conduct himself a voir dire examination of jurors in a way not likely*

[31] Appendix A hereto, *infra*, p. 71.

to discover whether such jurors were free from the prejudice caused by the pre-trial publicity.

In reaching the independent conclusion that petitioners "had their rights fully preserved by the voir dire examination," the District Court stated that it did not "regard the voir dire as defective on the ground that in accordance with the dignified, expeditious, and fair practice of the Commonwealth, only the trial judge put(s) questions"; and that it considered "the actual questions put by" the judge as adequate. The District Court said that the questions "covered not only the grounds specified by Mass. G.L. (Ter. Ed.) c. 234, s. 28 [32] but also other points. They were calculated to discover whether a juror was free from prejudice caused by pre-trial publicity. These questions satisfied the Massachusetts Supreme Judicial Court and they satisfy the demands of the due process clause." (R. pp. 417-418.) The court below also independently evaluated the voir dire examinations and determined that "under the circumstances of this case the jurors fully meet the constitutional test of impartiality laid down in *Irvin* v. *Dowd.*" (Appendix A hereto, *infra,* pp. 74-77.) Both federal courts were, in the opinion of petitioners, mistaken in their conclusions.

While there may not be any "constitutional right to a personal voir dire of the jury", *Hamer* v. *United States,* 9 Cir., 259 F.2d 274, 279, *cert. denied,* 359 U.S. 916, 79 S. Ct. 592, the voir dire examination is nevertheless "subject to the essental demands of fairness". In *Aldridge* v. *United*

[32] That section reads: "Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead".

States, 283 U.S. 308, 310, 51 S. Ct. 470, 471, even though the trial judge had inquired whether any of the jurors knew or remembered reading any of the facts in the case or whether they had any prejudice or bias against circumstantial evidence or whether they had formed or expressed an opinion as to the guilt or the innocence of the defendant, the Supreme Court reversed a conviction of a negro for murder of a white man because of the trial judge's refusal to permit examination of prospective jurors as to whether they had any racial prejudice which would prevent them from giving an impartial verdict. Speaking for the Court, Mr. Chief Justice Hughes said at page 310 of 283 U.S., 51 S. Ct. at 471:

> "In accordance with the existing practice, the questions to the prospective jurors were put by the court and the court had a broad discretion as to the questions to be asked. *The exercise of this discretion, and the restrictions upon inquiries at the request of counsel, were subject to the essential demands of fairness.*" (Italics supplied.)

Here, as will be shown, petitioners were denied a fair voir dire examination of jurors because they were denied the opportunity of proving bias and the trial judge made no real attempt to prove or disprove bias.

From the very beginning, petitioners had consistently contended that massive, sustained, prejudicial publicity, assumed to have been calculatedly inspired by the prosecutors, would prejudice any petit jury selected to try them. Because of their charge, the voir dire examination, whether conducted by the trial judge or under his direction, should have attempted to elicit whether those veniremen, *including the twelve serving on the jury who denied the existence of any opinion or bias*, were merely insensible of it, *cf. Commonwealth* v. *Trefethen*, 157 Mass. 180, 195, 31 N.E. 961, 967; *Globe Newspaper Co.* v. *Commonwealth*, 188 Mass.

COPY BOUND CLOSE IN CENTER

449, 453, 74 N.E. 682, 684; and whether those veniremen, including the two serving on the jury who testified that they would not be influenced by their preconceptions as to petitioners' guilt or innocence, were in fact endowed with such a sense of detachment that they could exclude the unconscious influence of their preconceptions, *Delaney* v. *United States*, 1 Cir., 199 F.2d 107, 112-113; *People* v. *Hryciuk*, 5 Ill. 2d 176, 183-185, 125 N.E. 2d 61, 65-66. Instead, the trial judge refused to permit petitioners to conduct the voir dire examination of prospective jurors, refused to put the questions listed in petitioners' motion for questions to each prospective juror, and refused to question any prospective juror beyond the statutory questions provided by Mass. G.L. (Ter. Ed.) c. 234, s. 28, except when the prospective juror admitted to an opinion and then only asked whether that prospective juror could decide the case purely on the evidence as it would be presented in court uninfluenced by any preconceived opinions. Compare *Irvin* v. *Dowd*, 81 S. Ct. 1639, 1645.

On forty-five different occasions, the trial judge declared indifferent a venireman who had admitted having an opinion and so unfairly compelled petitioners to exercise forty-five peremptory challenges. While it may well be that an accused, who is required unnecessarily to use his peremptory challenges, cannot complain that his constitutional rights have been violated as long as he is tried by an impartial jury, *Hayes* v. *Missouri*, 120 U.S. 68, 7 S. Ct. 350; *Hopt* v. *Utah*, 120 U.S. 430, 7 S. Ct. 614; *Spies* v. *Illinois*, 123 U.S. 131, 164-180, 8 S. Ct. 22, 23-31, a mere reading of eight of those voir dire examinations will readily disclose, instead of "a patient and careful succession of examinations by the trial judge", the unfairness of the voir dire examination.

One of these eight veniremen testified that he "could possibly change that opinion." (R. pp. 112-113)

Another answered, "Well, that's quite a question, your Honor. It's hard to answer that", in response to the question whether his opinion was so strong or firmly fixed that he would be unable to form a decision on the evidence, separate and apart from any preconceived idea that he had (R. pp. 157-159).

A third testified, "I have fully made up my mind" (R. pp. 167-169).

A fourth answered that he thought his opinion so strong that it could not be influenced or changed by the evidence but that he imagined that he could be capable of carrying out an oath to well and truly try the issue according to the evidence, divorced from any preconceived opinion (R. pp. 177-178).

A fifth testified that he might change his opinion if the facts were presented to him in Court (R. pp. 203-206).

A sixth answered that he did not think that he would be able to carry out the juror's oath (R. pp. 262-264).

A seventh venireman testified that he was prejudiced because "I think that someone is not guilty that won't hide for a long time. They know they are looking for them. Two of the defendants were summoned, or whatever it is, and when you are not guilty and there isn't any guilt you show that you are not guilty. That is the only thing I think." (R. pp. 349-350.) He obviously had reference to Richardson and Faherty who were not apprehended until May 16, 1956.

The eighth venireman testified that he thought his opinion was so strong that it could not be influenced by the evidence and that he did not know whether he could decide the case purely on the evidence, uninfluenced by any prior opinion. Of particular interest is the method employed by the trial judge in questioning the eighth venireman.

"Q. Have you formed or expressed any opinion as to the guilt or innocence of any of these defendants?

"A. I have formed an opinion.

"Q. Is that opinion so strong that it could not be influenced by evidence?

"A. I think so, your Honor.

"Q. Do you think you could take an oath to hear this case, hear the evidence from all sides and then decide the case in a fair and impartial decision, purely on the evidence, not influenced by any prior opinions that you may have?

"A. I don't know. I have formed my own opinion now.

"The Court: How is it formed? Is your opinion any more than this, that somebody has been charged with a crime and is being charged here; is it any more than that?

"A. No, that is it.

"Q. You did not form any opinion as to whether that person is guilty or innocent, you know, being arrested is not evidence of guilt. The fact that a person is being tried here is not evidence of guilt. Do you think you could be fair to the Government and fair to every defendant?

"A. I suppose so, your Honor." (R. pp. 353-354.)

Needless to say, the publicity of which petitioners complain was something more than the mere fact that petitioners had been indicted. The trial judge was certainly aware that it was. These examinations, if nothing else, demonstrate the unfairness of the trial judge.

Furthermore, the trial judge considered negative answers to the following questions as conclusive evidence of a prospective juror's impartiality:

"Have you expressed or formed an opinion as to the guilt or innocence of any of these defendants?

"Are you conscious of any bias or prejudice for or against anyone in this case?

"Do you know of any reason that would prevent you from reaching a fair and impartial decision or verdict on the evidence as it will be presented to you here and under the law as the court will give you the law?"

In considering such negative answers as conclusive, he was wrong. As was stated by Mr. Justice Clark in *Irvin* v. *Dowd*, 81 S. Ct. 1639, 1645, *"where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight."* (Emphasis added.) See also Black, J., dissenting in *Dennis* v. *United States*, 339 U.S. 162, 176, 70 S. Ct. 519, 527.

Moreover, those three questions were the only questions relating to prejudice put by the trial judge to twelve of the fourteen veniremen chosen to serve on the jury. (R. pp. 363-385.) As already indicated, the trial judge never questioned any of the prospective or impanelled jurors concerning what he had read or heard about the robbery, or about petitioners' part in the robbery, or about petitioners' criminal records and involvement in other serious crimes. He never asked any venireman who admitted having an opinion what it was. He never inquired whether if the positions of the defendants and the jurors were reversed, he would accept as jurors the defendants if they had the same opinion of him as he had of them. And, of course, he never permitted petitioners to participate in such examinations. Compare *Irvin* v. *Dowd*, 81 S. Ct. 1639, 1645. See also *Reynolds* v. *United States*, 98 U.S. 145, 154-157; *Hopt* v. *Utah*, 120 U.S. 430, 432-436, 7 S. Ct. 614, 615-617; *Spies*

v. *Illinois,* 123 U.S. 131, 164-180, 8 S. Ct. 22, 23-31; *Holt* v. *United States,* 218 U.S. 245, 31 S. Ct. 2.

In the light of the few unimaginative questions asked of them, many jurors, *including the twelve serving on the jury who denied the existence of any opinion or bias,* were readily, and, no doubt, sincerely able to deny the existence of prejudice, and thus satisfy their psychological need to appear fair. *Cf. Irvin* v. *Dowd,* 8 S. Ct. 1639, 1645. Is it any wonder that "almost twenty-eight percent of the prospective jurors called in the case at bar professed to have formed no opinion at all as to the guilt or innocence of the accused"?

Because petitioners had been barred from participating in the voir dire examination, the few pedestrian questions asked by the judge were hardly enough to determine fairly whether the massive, sustained, prejudicial pre-trial publicity had made an impact upon the particular juror being examined, and if so, whether it had spent itself. "The right of a defendant to examine and cross-examine witnesses is (most) . . . essential to a fair trial." *Cf. In re Murchison,* 349 U.S. 133, 139, 75 S. Ct. 623, 627. *So, too, in the opinion of petitioners, is the right of a defendant to examine jurors on voir dire. If that opportunity is to be withheld by a trial judge without offending constitutional due process, he must, in a case such as this, serve as the defendant's advocate.*

In accepting Juror Wolusky, who did not "have a firm opinion", and Juror Leary, who had "a tentative opinion; could be changed," the trial judge completely ignored the teaching of this Court, "*the influence that lurks in an opinion once formed is so persistent that it unconsciously finds detachment from the mental processes of the average man.*" *Irvin* v. *Dowd,* 81 S. Ct. 1639, 1645. (Emphasis added.) See *Delaney* v. *United States,* 1 Cir., 199 F.2d 107, 112-113; and *People* v. *Hryciuk,* 5 Ill. 2d 176, 183-185, 125 N.E. 2d 61,

65-66. Furthermore, as demonstrated by *Irvin*, inappos
are the many federal and state cases which stress t
necessity for the challenger to show the actual existence
such an opinion in the mind of a juror as would raise t
presumption of partiality, and that the finding of ind
ference by the trial judge ought not to be set aside by
reviewing court unless the error is manifest. *Reynolds*
United States, 98 U.S. 145, 154-157, 25 Law Ed. 244, 24
247; *Hopt* v. *Utah*, 120 U.S. 430, 432-436, 7 S. Ct. 614, 61
617; *Spies* v. *Illinois*, 123 U.S. 131, 164-180, 8 S. Ct.
23-31; *Holt* v. *United States*, 218 U.S. 245, 31 S. Ct.
Leggett v. *State*, 227 Ark. 393, 299 S.W. 2d 59; *Coughlin*
People, 144 Ill. 140, 33 N.E. 1; *State* v. *Anderson*, 2
Iowa 1118, 33 N.W. 2d 1; *Garlitz* v. *State*, 71 Md. 293,
A. 39; *Stephens* v. *People*, 38 Mich. 739; *State* v. *Johns*
362 Mo. 833, 245 S.W. 2d 43; *State* v. *Sheerin*, 12 Mo
539, 31 P. 543; *State* v. *Simmons*, 120 N.J.L. 85, 198 A. 29
People v. *Buddensieck*, 103 N.Y. 487, 9 N.E. 44; *State*
Fujita, 20 N.D. 555, 129 N.W. 360; *Scribner* v. *State*,
Okla. Cr. 601, 108 P. 422; *Rice* v. *Emerson*, 181 Okla. 51,
P. 2d 498; *State* v. *Megorden*, 49 Or. 259, 88 P. 306; *Parso*
v. *State*, 160 Tex. Cr. 387, 271 S.W. 2d 643; *State* v. *Thor*
41 Utah 414, 126 P. 286; *Mainville* v. *State*, 173 Wis.
179 N.W. 764. In each of those cases, the defendant h
the opportunity, which he exercised, of conducting an e
tensive examination on voir dire. In the instant case, t
trial judge refused permission for petitioners to condu
the voir dire examination and refused to ask the questio
listed in petitioners' motion for questions to each prospe
tive juror. In short, he precluded any adversary inquiry
a vital issue which he had to decide fairly if petitione
were to have an impartial trial. Because the question
whether each juror was impartial was not tried "like a
other issue of that character", the trial judge himself w
duty bound to ask such questions as would seek fairly

elicit whether jurors Wolusky and Leary were actually able to "exclude even the unconscious influence of (their) . . . preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity". Instead, the questions, which he asked, merely sought to elicit whether jurors Wolusky and Leary thought that they could be fair. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner(s), but psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 81 S. Ct. 1639, 1645.

The trial judge, by his actions, effectively denied petitioners the opportunity to prove bias. He barred them from attempting to prove what they had contended from the very beginning—that the prosecutors had issued, caused and stimulated massive, sustained, prejudicial, pre-trial publicity, calculated and tending to convince the petit jury, which was then in the process of being selected to try petitioners of their guilt, and to arouse that petit jury's animosity indignation and prejudice towards and against them. And he made no real effort to prove or put to rest their contention. Possibly, he thought that an expeditious voir dire examination was desirable and that it would be detrimental to the administration of criminal justice in Massachusetts to spend the time necessary for the type of voir dire examination sought by petitioners. But, as was said in *Aldridge* v. *United States*, 283 U.S. 308, 315, 51 S. Ct. 470, 473, "we think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. *No surer way could be devised to bring the processes of justice into disrepute.*" (Italics supplied.) For just as the "*preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial trial*", *Dennis* v. *United States*, 339 U.S. 162, 171-

172, 70 S. Ct. 519, 523, *so must the denial of such an opportunity constitute a denial of a fair trial, Cf. Morford* v. *United States,* 339 U.S. 258, 70 S. Ct. 586.[33] (Italics Supplied.)

To insure fair trials, forty states have given a defendant in a criminal case the right to conduct a voir dire examination of prospective jurors. See Appendix D hereto, *infra,* p. 158. Nine of the other fifty states, while withholding from a defendant the right to conduct the voir dire examination, appear either by statute or by practice to require the trial judge to ask relevant questions submitted by counsel (Appendix D hereto, *infra,* p. 165.)

In the federal courts, the rule, as stated in the Rules of Criminal Procedure,[34] is similar to the Massachusetts statute. But in each of the following cases, the judgment of the lower court was reversed because the trial judge, who conducted the voir dire examination of jurors, refused to ask material questions proposed by counsel. *Morford* v. *United States,* 339 U.S. 258, 70 S. Ct. 586; *Aldridge* v. *United States,* 283 U.S. 308, 51 S. Ct. 470; *Sellers* v. *United States,* D.C. Cir., 271 F.2d 475; *Frasier* v. *United States,* 1 Cir., 267 F.2d 62. For further evidence of the universal belief in the federal courts that fairness requires an extensive voir dire examination of jurors in an appropriate case, see *United States ex rel. Darcy* v. *Handy,* 351 U.S.

---

[33] In *Irvin* v. *Dowd,* 81 S. Ct. 1639, the defendant had the right, which he exercised, to examine jurors directly. See Appendix D hereto, *infra,* p. 160. Here, petitioners had neither the right nor the opportunity.

[34] Rule 24(a) of the *Federal Rules of Criminal Procedure* provides: "The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

454, 76 S. Ct. 965; *Holt* v. *United States,* 218 U.S. 245, 31 S. Ct. 2; *Reynolds* v. *United States,* 98 U.S. 145, 25 Law Ed. 244; *United States* v. *Clancy,* 7 Cir., 276 F.2d 617; *Wagner* v. *United States,* 9 Cir., 264 F.2d 524, *cert. denied,* 360 U.S. 936, 79 S. Ct. 1459; *Spells* v. *United States,* 5 Cir., 263 F.2d 609, *cert. denied,* 360 U.S. 920, 79 S. Ct. 1439; *Chavez* v. *United States,* 10 Cir., 258 F.2d 816, *cert. denied,* 359 U.S. 916, 79 S. Ct. 592; *Juelich* v. *United States,* 5 Cir., 214 F.2d 950; *Delaney* v. *United States,* 1 Cir., 199 F.2d 107; *Paschen* v. *United States,* 7 Cir., 70 F.2d 491, 495. Massachusetts, on the other hand, is the only state which in practice not only denies a defendant the opportunity to conduct a voir dire examination of prospective jurors, but sanctions, as within the powers of discretion, the limitation of the questions put by the trial judge to those required by statute. This practice, for all practical purposes, denied petitioners the right to be heard by counsel at a vital stage of their trial and should not be permitted. *Cf. Ferguson* v. *State of Georgia,* 365 U.S. 570, 81 S. Ct. 756.

By way of summary, the trial judge in the instant case denied petitioners the opportunity to prove bias and he himself asked few and unimaginative questions of the impanelled jurors. He was content in the belief that the standards imposed by the federal constitution would sanction conclusions of impartiality based upon a pedestrian examination in which petitioners' counsel were barred from participating. In petitioners' view, such an examination was constitutionally inadequate for determining whether the impanelled jurors were in fact impartial and indifferent, *cf. Rogers* v. *Richmond,* 365 U.S. 534, 81 S. Ct. 735; and its effect was to deny petitioners the due process of law guaranteed by the Fourteenth Amendment.

IV. *It is a violation of the Due Process Clause of the Fourteenth Amendment to the federal constitution for a State to hold petitioners for trial where state and federal enforcement officials have, with calculation to prejudice the petit jury, issued, caused and stimulated massive, sustained, prejudicial, pre-trial publicity "so deep-seated and ineradicable as to make it impossible for (petitioners) . . . to obtain a fair trial at any time during the period within which they might have obtained a constitutionally speedy trial."* [35]

Since petitioners received a speedy trial, the last issue is moot unless it should be held, contrary to the decisions of the courts below, that petitioners were denied a fair and impartial trial.

That the deliberate denial to a federal prisoner of his right to a speedy trial, guaranteed to him by the Sixth Amendment to the federal constitution, entitles him to a dismissal of the prosecution, has been established by *Petition of Provoo*, 17 F.R.D. 183, *aff'd. sub nom. United States* v. *Provoo*, 350 U.S. 857, 76 S. Ct. 101; *cf. Pollard* v. *United States*, 352 U.S. 354, 361-362, 77 S. Ct. 481, 485-486. But whether a similar denial to a state prisoner constitutes a violation by the State of the Due Process Clause of the Fourteenth Amendment has not as yet been decided. However, implicit in *Irvin* v. *Dowd*, 359 U.S. 394, 79 S. Ct. 825; and expressed in *Id.*, 81 S. Ct. 1639, is the conclusion that a state prisoner, who because of prejudicial publicity fails to receive a fair trial, has not been accorded the due process of law guaranteed him by the Fourteenth Amendment. Because the right to a speedy trial is not only closely interwoven with the right to a fair trial, but is also, for the reasons expressed in *Petition of Provoo*, 17 F.R.D. 183, a "principle of justice so rooted in the traditions and con-

[35] Appendix A hereto, *infra*, p. 64.

science of our people as to be ranked as fundamental," *Snyder* v. *Commonwealth of Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332; *Palko* v. *State of Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152, this Court should hold that a State which has deliberately [36] prevented a defendant from securing a speedy trial has violated constitutional due process.

It has been assumed not only by the Massachusetts trial judge and Supreme Judicial Court but also by both federal courts that the prosecutors issued, caused and stimulated massive, prejudicial pre-trial publicity, calculated and tending to convince any trial jury which might be selected to try petitioners of the petitioners' guilt and to arouse such a jury's animosity, indignation and prejudice towards and against petitioners. In that sense, the actions of the prosecutors were deliberate.

Whether a particular delay in providing an accused with a fair and impartial trial amounts to a constitutional deprivation of rights depends upon the circumstances. See, e.g., *Pollard* v. *United States*, 352 U.S. 354, 361, 77 S. Ct. 481, 486. Here five of the petitioners were remanded to jail on January 16, 1956, when they were arraigned, because of an inability to furnish what they submit was excessive bail; the other two were confined for the same reason on May 17, 1956, when they were arraigned. At the time of their arraignment, six years had elapsed since the commission of the crimes with the result that there was a strong possibility that any witnesses who might have proved their innocence had long since disappeared or forgotten the circumstances. It must have been evident even to the government's representatives that any delay in putting petitioners to trial could only prolong petitioners' preliminary imprisonment because of an inability to raise

[36] Here the word "deliberate" is used in the sense that it was employed in *Petition of Provoo*, 17 F.R.D. 183.

bail, intensify the anxiety and fear which all prisoners awaiting trial must experience and increase the possibility of loss of necessary witnesses. And yet the government, by feeding the press with prejudicial publicity, calculated and tending to convince any petit jury, which might be selected to try petitioners, of their guilt, embarked upon a course of action which certainly placed petitioners on the horns of a dilemma if the relief sought should not be, as both federal courts concluded, available. Petitioners could avoid the evils of delay by foregoing a fair trial; or petitioners could, if they requested and the trial judge granted a continuance, obtain a fair trial at some distant date when it might be said with reasonable certainty that the prejudicial effect of the publicity had worn off, but only if petitioners would remain in custody while awaiting trial, continue to live under the sword of Damocles, and run increasingly greater risks that their witnesses might become unavailable or lose their memories—the very evils which the constitutional requirement of a speedy trial seeks to correct. See *Petition of Provoo,* 17 F.R.D. 183, 198; *Commonwealth* v. *Hanley,* 337 Mass. 384, 387-388, 149 N.E. 2d 608, 610.

In the instant case, petitioners were prevented, as already shown, from securing a fair and impartial jury when the trial took place (August 6, 1956 to October 5, 1956), or during any prior period by the deliberate actions of the government; and unquestionably could not have obtained a fair and impartial jury at any time immediately thereafter. In the circumstances, it would seem that petitioners have been denied their federal constitutional right to a fair, impartial, and at the same time speedy trial.[37]

---

[37] Provoo employed a motion to dismiss to accomplish what petitioners sought by their motions to quash, pleas in abatement and pleas in bar. Under Rule 12(a) of the *Federal Rules of Criminal Procedure,* such pleas were abolished and their place taken by a motion to dismiss.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL T. SMITH
MANUEL KATZ
209 Washington Street
Boston 8, Massachusetts
Attorneys for Petitioners
Pino, McGinnis and Costa

ROBERT DEGIACOMO
80 Federal Street
Boston, Massachusetts
Attorney for Petitioner Maffie

LAWRENCE O'DONNELL
418 Adams Street
Dorchester, Massachusetts
Attorney for Petitioners
Geagan, Richardson and
Faherty

Appendix A

United States Court of Appeals
For the First Circuit

No. 5643.

MICHAEL VINCENT GEAGAN ET AL.,
PETITIONERS, APPELLANTS,
v.
JOHN A. GAVIN, SUPERINTENDENT,
MASSACHUSETTS CORRECTIONAL INSTITUTION,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Manuel Katz and *Lawrence F. O'Donnell*, with whom *Paul T. Smith*, *Robert DeGiacomo* and *Henry Sontag* were on brief, for appellants.

John F. McAuliffe, Special Assistant Attorney General, with whom *Edward J. McCormack*, Attorney General, *Garrett H. Byrne*, District Attorney, and *Gerald F. Muldoon*, Special Assistant Attorney General, were on brief, for appellee.

OPINION OF THE COURT.
June 30, 1961.

WOODBURY, *Chief Judge*. This is an appeal by eight persons, who with three others [1] have come to be known as the "Brink's Robbers," from a judgment of the United States District Court for the District of Massachusetts, Wyzanski, J., denying their petition for a writ of *habeas corpus*, and from an order denying their motion for a new trial or for amended findings of fact and conclusions of law.

[1] Joseph J. "Specks" O'Keefe, who later pleaded guilty and turned state's evidence and Stanley A. Gusciora and Joseph S. Banfield, both deceased.

After dark on January 17, 1950, a band of armed men dressed alike and wearing rubber Halloween masks entered the premises of Brink's Incorporated [2] in downtown Boston by means of pass keys, trussed the Brink's employees on guard and made off with $1,219,000 in cash. Hue and cry, modern version, was promptly raised but nevertheless the perpetrators of the crime succeeded in evading police traps and road blocks and made good their escape. Naturally enough a successful crime of such magnitude executed so dramatically and with such daring received extensive local and national coverage in the newspapers and on television and radio.

Six years later, on January 13 and January 16, 1956, the eight appellants and the three other persons mentioned above were indicted by a grand jury in the Superior Court of the Commonwealth of Massachusetts for Suffolk County for a variety of offenses arising out of the "Brink's Robbery." This event and the ensuing arrests of the accused were also covered extensively in the news media. On August 6, 1956, the eight appellants on pleas of not guilty entered for them by the court on their standing mute were set to the bar to be tried by jury on some of the indictments. Two months later, on October 6, 1956, they were found guilty as charged in the indictments on which they were tried and on October 9, 1956, they were sentenced to long terms of imprisonment.

On appeal the Supreme Judicial Court of the Commonwealth of Massachusetts affirmed the judgments of sentence, *Commonwealth* v. *Michael Vincent Geagan & Others*, 339 Mass. 487 (1959), *cert. denied* 361 U.S. 895, and thereupon on January 18, 1960, the appellants petitioned the court below for *habeas corpus*. That court, accepting the allega-

[2] Brink's, Incorporated, is a corporation engaged in the business of transporting money and valuables, typically in armored automobiles.

tions of the petition as true and ruling in accordance with *Brown* v. *Allen*, 344 U.S. 443 (1953), that available state remedies had been exhausted, entered judgment denying the petition and issued a certificate of probable cause for appeal pursuant to Title 28 U.S.C. § 2253.

The appellants' contention on this appeal, in the court below and in both the Superior and Supreme Judicial courts of Massachusetts, is that massive sustained publicity instigated and stimulated in part by federal and state enforcement officials poisoned the public mind against them to such an extent that they could not and did not have a fair trial in conformity with the due process requirement of the Fourteenth Amendment of the Constitution of the United States. More specifically, their claim is that there was such extensive prejudicial publicity attendant upon their indictment, arrest and trial purporting to emanate and emanating from official sources that the grand jury which indicted them was prejudiced, that the petit jury which tried them was prejudiced and that the prejudice was so deep-seated and ineradicable as to make it impossible for them to obtain a fair trial at any time during the period within which they might have obtained a constitutionally speedy trial.

Although counsel for the appellants presented their contention to the trial court by seasonable motions to quash, pleas in abatement and pleas in bar, they at no time prior to or during the trial asked for any judicial action designed to curb or control continuance of the publicity of which they complained.[3] Nor did counsel for the appellants move for a change of venue or for a continuance. Since in the present state of the law it is not clear that any court, state

[3] At oral argument in this court counsel admitted that they considered making application to the trial court for some sort of order limiting publicity but after conferring with one another decided not to do so.

or federal, has any practically effective means at its disposal for preventing "trial by newspaper," to use a catch phrase,[4] see *Toledo Newspaper Co.* v. *United States*, 247 U.S. 402 (1918), overruled by *Nye* v. *United States*, 313 U.S. 33 (1941); *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947), and since there is certainly some basis for counsels' assertion that the prejudicial publicity was so widespread and continuous that the defendants would fare no better in any other county in Massachusetts or be any better off if the trial were postponed for any reasonable length of time, it seems to us that for the purposes of this particular appeal the defendants should stand no worse for their counsels' failure to ask for some sort of court order limiting publicity or for a change of venue or a continuance. *Cf. Delaney* v. *United States*, 199 F.2d 107, 116 (C.A. 1, 1952). We shall therefore proceed to the merits.

But this does not mean that we shall undertake to cover once more the same ground already so well covered by the highest court of the Commonwealth of Massachusetts and the District Court. The opinion of the Massachusetts Supreme Judicial Court written by Mr. Chief Justice Wilkins was aptly described by the court below as "a model of clarity in its exposition of the record in the state court, of the issues presented, and of the governing authorities." We can say the same with reference to Judge Wyzanski's opinion for the District Court. Nothing would be gained by repeating what has already been so well said. Therefore on this appeal our consideration will be limited to the ques-

[4] Perhaps when an appropriate occasion arises the Supreme Court will see fit to shed more light on the exceedingly difficult and vexing problem of judicial control over slanted pre-trial publicity. See Mr. Justice Frankfurter's discussion of this problem in *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912 (1950).

tion whether, in the light of *Irvin* v. *Dowd,* decided by the Supreme Court of the United States on June 5, 1961, the defendants, in spite of the publicity of which they complain, were nevertheless accorded a fair trial by a panel of impartial, indifferent jurors as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The question whether jurors are impartial in the constitutional sense is one of mixed law and fact as to which the challenger has the burden of persuasion, for: "Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . . " *Reynolds* v. *United States,* 98 U.S. 145, 157 (1878), quoted with approval in *Irvin* v. *Dowd,* supra. And, to decide whether the challenger has sustained his burden, it is the duty of this court as stated in the case last cited "to independently evaluate the *voir dire* testimony of the impaneled jurors."

Some general observations are in order, however, before taking up the *voir dire* examination of the veniremen generally and the testimony on *voir dire* of the two petit jurors whom the appellants specifically charge with harboring constitutionally disqualifying prejudice.

It can certainly be said that the Brink's Robbery excited widespread public interest and no little general public amazement at the obvious skill with which it was planned and the dramatically bold and daring way in which a group of armed and masked men invaded supposedly impregnable premises and successfully made off with a million two hundred and nineteen thousand dollars. It cannot be said, however, that the robbery stirred general feelings of rage and revulsion touching off widespread public clamor for vengeance on those accused of perpetrating it, for it was

not accompanied by any physical violence except the disarming and trussing of the guards on duty.[5] The crime certainly did not arouse public passion and emotion in any way comparable to that aroused by the rape and murder of a six-year-old girl, *Stroble* v. *California,* 343 U.S. 181 (1952), or the slaughter by a husband of his wife and children, *Ciucci* v. *Illinois,* 356 U.S. 571 (1958), or multiple murders, *Irvin* v. *Dowd,* supra, see also the earlier report of the same case, 359 U.S. 394 (1959). Far less did the Brink's Robbery excite public hysteria accompanied by mob violence such as the rape of a white woman by four armed negroes, *Shepherd* v. *Florida,* 341 U.S. 50 (1951), or the killing of white men by negroes in Arkansas, *Moore* v. *Dempsey,* 261 U.S. 86 (1923). Not only was the death penalty not involved but also no feelings of race or religious prejudice were aroused nor did the crime have any even indirect political innuendo as in *Delaney* v. *United States,* 199 F.2d 107 (C.A. 1, 1952).

Furthermore, the trial itself, far from being mob-dominated as in *Moore* v. *Dempsey,* supra, was conducted from first to last with dignity and decorum in a calm judicial atmosphere.

Under these circumstances it is not surprising that no very serious difficulty, as in *Irvin* v. *Dowd,* was encountered in finding jurors who at least professed not to have formed an opinion of guilt. Instead of 90% of the prospective jurors examined on the point expressing some degree of opinion that the accused was guilty, 306 of the 1104 or almost 28% of the prospective jurors called in the case at bar professed to have formed no opinion at all as to the

[5] Some pretrial publicity suggested that the appellants may have been responsible for the disappearance or death after the crime of certain local underworld characters "because they knew too much." But in this day and age the "rubbing out" of a few small-time hoodlums is not enough to cause any general public clamor for revenge.

guilt or innocence of the accused.[6] Moreover, in *Irvin* v. *Dowd* eight of the twelve jurors eventually selected said on *voir dire* that they thought the accused was guilty, whereas in the case at bar only two of those chosen to sit admitted to any preconception, and neither of them disclosed or was asked whether he thought the accused were guilty or innocent.

In conformity with long established local practice, the *voir dire* examination of all prospective jurors was conducted not by counsel but by the trial justice, although on occasion the justice put questions suggested by counsel for the defendants. His examination was characterized by the Supreme Judicial Court of Massachusetts as "patient and careful" which is certainly not an overstatement. An examination of the record shows that full disclosure of the nature of the case and the names of the accused and their counsel was made to each group of veniremen as it was called, and that each individual as he came forward was carefully examined as to any interest, bias or prejudice he might have. Even after it became evident that the defendants intended to exhaust all the peremptory challenges allowed them by statute (262) before they would accept a single juror, and the first juror was not seated until the thirteenth day of examining veniremen, the justice nevertheless continued carefully and thoroughly to examine each prospective juror as he was called.

---

[6] Further statistical comparison along this line with *Irvin* v. *Dowd* is impossible for lack of adequate data, for two hundred and thirty-nine prospective jurors were excused by the justice presiding at the trial for reasons of health or hardship, in many instances before they were asked whether they had formed any opinion or not, and in only a very few instances do we know whether the 659 prospective jurors who admitted that they had formed some sort of opinion thought the accused guilty or innocent. Since the few who said what their opinion was were not of the same view, some thinking the accused guilty and others innocent, we can hardly assume that all those with an opinion thought the defendants guilty.

We turn now to the *voir dire* examinations of the two jurors charged with harboring constitutionally disqualifying prejudice against the defendants. In material part their examinations were as follows:

JUROR CHARLES A. WOLUSKY

Q. Have you formed or expressed any opinion as to the guilt or innocence of any of these defendants? A. I don't have a firm opinion.

* * *

Q. Are you aware of any bias or prejudice for or against anyone in this case? A. Not that I know of.

* * *

The Court: The juror is indifferent.

* * *

Mr. Smith: The same objection and exception and challenge for cause for all defendants. Specifically we object and except to your Honor's ruling that the venireman stands indifferent, because of the statement that he, and I quote, said, "I don't have a firm opinion," which indicates he has some opinion.

The Court: Very well. When I asked you that question I understood that you would be able to take the oath of a juror, to well and truly try the issues between the Commonwealth and the defendant, according to the evidence, that would be uninfluenced in any way by any preconceived notions.

* * *

The Juror: You are right, because I don't convict anyone unless I know the facts, and I don't know the facts.

JUROR CORNELIUS A. LEARY

Q. Do you know of any reason why you cannot serve on this jury? A. No, your Honor.

Q. Have you expressed or formed any opinion as to

the guilt or innocence of any of these defendants? A. I have a tentative opinion; could be changed.

* * *

Q. If you are accepted as a juror, an oath will be administered to you that you will well and truly try the issues between the Commonwealth and these defendants, according to the evidence, which means that you should serve with an open mind and decide the case purely on the evidence as it will be presented here, uninfluenced by any preconceived notion, ideas, or opinions that you may now have. Do you think you could take that oath and adhere to it faithfully? A. I do, your Honor.

* * *

Q. Are you aware of any prejudice or bias for or against anyone in this case? A. No, your Honor.

Q. Do you know of any reason that would prevent you from reaching a fair and impartial decision or verdict exclusively on the evidence and under the law as the Court will give you the law? A. No.

* * *

Mr. De Giacomo: If your Honor please, before the juror is sworn, since the interrogation has indicated that the juror testified that he had a tentative opinion, but it could be changed, would your Honor address questions to the juror as to whether or not he knows how much evidence would be necessary to change his opinion?

Q. [By the Court] Mr. Leary, if you are sworn as a juror, you will be instructed by the Court that every defendant is presumed to be innocent, and that it will be your duty to bring in a verdict, return a verdict of Not Guilty, unless you are convinced beyond a reasonable doubt on the evidence and the law that he is Guilty.

Now, do you think that your opinion, or whatever notions you have, will interfere with carrying out that oath, those instructions? A. No, your Honor.

These *voir dire* examinations speak eloquently for themselves. The most that they show is that the jurors had formed some impression or opinion as to the merits of the case as might well be expected of intelligent and alert citizens of the community. But, as the Court pointed out in *Irvin* v. *Dowd:* "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." Certainly prospective jurors, like everyone else, suffer from a variety of biases and prejudices of which they are not aware. The best that the courts can do, however, is to take a prospective juror's word for his impartiality or for his capacity to overcome a tentative opinion on the merits, valued in the case of the trial judge, by an estimate of the prospective juror's character and intelligence formed by observation of the general appearance of the individual concerned and his demeanor under examination. Moreover, one who is aware of a slant of mind may not only be more intelligent than one who is not, but, also, being aware and more intelligent, be better able to make due allowance for his prediliction and guard against it in conscientiously performing his sworn duty as a juror.

On our own independent evaluation of the *voir dire* examination of the impaneled jurors the appellants' challenge fails. It seems clear to us that under the circumstances of this case the jurors fully meet the constitutional test of impartiality laid down in *Irvin* v. *Dowd.*

Judgment will be entered affirming the judgment and order of the District Court.

Appendix B

OPINION OF MASSACHUSETTS SUPREME JUDICIAL COURT

COMMONWEALTH
v.
MICHAEL VINCENT GEAGAN & others
(and twelve companion cases [1]).

WILKINS, C. J. On January 17, 1950, there was a robbery at 165 Prince Street, Boston, the premises of Brink's, Incorporated, a company engaged in the transportation of money and valuables. The amount taken was $1,219,000. Eight defendants have been convicted on various indictments growing out of that robbery, and bring these cases here on appeals pursuant to G. L. c. 278, §§ 33A-33G, as amended, which are accompanied by a summary of the record, a transcript of the evidence, and their respective assignments of error.

The eight defendants are Geagan, McGinnis, Faherty, Pino, Richardson, Maffie, Costa, and Baker. Case number 99 is an indictment in three counts for robbery while armed against these eight, one Gusciora and one Banfield (both deceased before trial), and one O'Keefe (who pleaded guilty to that indictment and testified for the Commonwealth). The indictment in case number 100 charges the same persons with breaking and entering in the nighttime with intent to commit robbery. In these two cases a verdict of not guilty was directed for McGinnis, and the other seven defendants were convicted. All eight defendants were convicted on the indictment in case number 101, charging conspiracy to steal. McGinnis also was convicted in ten cases against him alone: case number 145, an indictment charging him with receiving stolen goods:

[1] Of the companion cases two are entitled *Commonwealth* v. *Michael Vincent Geagan & others*, and ten are entitled *Commonwealth* v. *Joseph F. McGinnis*.

case number 147, an indictment in ten counts, charging him with being an accessory before the fact to breaking and entering in the nighttime with intent to commit a felony; and cases number 148 to 153, inclusive, 156, and 157, eight indictments, each in three counts, charging him with being an accessory before the fact to armed robbery.

There were returned many more indictments than the number tried. In the defendants' brief the total is given as 158 indictments, containing 496 counts. To these the defendants filed a large number of special pleadings, much too extensive helpfully to be set forth at length. It will be convenient to describe them as summarized in the defendants' brief. Each defendant filed to each indictment in which he was named as a defendant a motion to quash, a plea in abatement, and a plea in bar, and in support of each an affidavit to which there were seven exhibits. Each special pleading concluded with prayers that the Commonwealth be ordered to file a replication "or other answer"; that thereafter the special pleading be set down for hearing; and that the indictment be barred, abated, or quashed, as the case might be. Each defendant claimed a trial by jury on factual issues which he contended were raised by grounds 1, 2, 3, and 6 of each special pleading and its accompanying affidavit. All issues presently material were sought to be raised by each such plea and motion.

Ground 1 alleged that the indictment was returned in violation of art. 12 of the Declaration of Rights of the Constitution of the Commonwealth, G. L. (Ter. Ed.) c. 277, § 5, the Fourteenth Amendment to the Constitution of the United States, and 18 U.S.C. (1952) § 241. The supporting allegations were that prior to the commencement of the grand jury proceedings the district attorney, his assistants and investigators, "other officials of the Commonwealth," the Federal Bureau of Investigation, and the Federal Department of Justice "issued and caused or permitted to

be issued without denial, retraction, minimization or suppression . . . news releases and statements setting forth in great detail: that the so called Brink's robbery had unequivocally been solved; that the said defendants together with other defendants had unequivocally planned and committed the so called Brink's robbery; how the robbery was solved; how the robbery was planned and committed by the said defendants together with the other defendants; the criminal record and so called background data of each of the defendants; and linking the disappearance, death or murder of others and other crimes with the so called Brink's robbery and the said defendants"; that "such releases and statements appeared under large and sensational headlines and in great detail in every daily newspaper published in Boston and in every, or nearly every, daily newspaper published not only elsewhere in Massachusetts, but throughout the nation"; that "such releases and statements, or detailed summaries thereof, were repeatedly broadcast and televised over radio and television stations located in Massachusetts, as well as over national hookups heard and seen in Massachusetts" ; and that such "widespread and sensational publicity" was "calculated to and did tend to convince the public, in general, and the grand jury, in particular, of the guilt of each of the defendants and to arouse their animosity, indignation and prejudice towards and against each of the said defendants."

Ground 2 alleged that the return of the indictment was repugnant to art. 12, to c. 277, § 5, and to the Fourteenth Amendment because "unauthorized persons were present in the grand jury room during proceedings and deliberations of the grand jury returning this indictment."

Ground 3 alleged that the return of the indictment was repugnant to the same provisions as in ground 2, because "prior to, during, and subsequent to, the proceedings con-

ducted by the grand jury returning this indictment" the district attorney, his assistants and investigators, other officials of the Commonwealth, the Federal Bureau of Investigation, and the Federal Department of Justice violated the secrecy of the proceedings "by issuing and causing or permitting to be issued, news releases and statements disclosing what witnesses summoned before such grand jury would testify to, were then testifying to, or had testified to."

Ground 6 alleged that the defendants "are unable to secure a fair and at the same time speedy trial" as guaranteed by arts. 1, 11, and 12 of the Declaration of Rights, the Fourteenth Amendment, and 18 U.S.C. (1952) § 241. The supporting allegations as to statements since the return of the indictment are similar to those made in ground 1, with additional statements as to "what Joseph 'Specs' O'Keefe, one of the defendants who has heretofore pleaded guilty, or a member of his family . . . said implicating the defendants not only in the Brink's robbery but in other crimes including murder, kidnapping, the escape of 'Trigger' Burke[1] and larceny; how the said Joseph 'Specs' O'Keefe has stated that a $200,000 defence fund had been established by the defendants; how the said Joseph 'Specs' O'Keefe has accused other of the defendants of stealing from him his share of the Brink's robbery loot; how part of the loot had been or was about to be recovered; where the bodies of those supposedly murdered by the defendants had been, or were suspected of being, buried; and how other defendants had confessed"; that such "releases and statements have frequently appeared in magazines having substantial circulations in Massachusetts and throughout the nation"; and that the "news releases and statements and the widespread publicity given them have

[1] See *Commonwealth* v. *Locke*, 338 Mass. , Mass. Adv. Sh. (1959) 459.

been calculated to and tend to convince the public in general and any petit jury which may be selected in the future to try this indictment, in particular, of the guilt of each defendant, and to arouse and maintain their animosity, indignation and prejudice towards and against each of the said defendants."

Before trial on the merits the issues raised by the three kinds of special pleadings were considered in the Superior Court on representative papers filed in certain of the cases. This was done for convenience and without objection. While there was no confusion in the Superior Court, these matters, coming here on a lengthy stenographic transcript of the hearing and without copies of all the papers, present themselves to us in time consuming fashion. The judge took up these issues first upon the motions to quash, all of which were denied, and then upon the pleas in abatement, and finally upon the pleas in bar. He ultimately extended his earlier rulings upon the motions to the pleas, all of which were overruled or disproved.

As the substance and not the name of a pleading controls (*Commonwealth* v. *Wakelin*, 230 Mass. 567, 571; *E. S. Parks Shellac Co.* v. *Jones*, 265 Mass. 108, 110; *Toy* v. *Green*, 319 Mass. 354, 357), we shall consider the several grounds of the pleadings which we have summarized above, under the forms of procedure to which their substance is appropriate.

1. A motion to quash is confined to taking objection to an indictment "for a formal defect apparent on the face thereof." G. L. (Ter. Ed.) c. 278, § 17.[1] It is the equivalent of a demurrer. *United States* v. *Slobodkin*, 48 F. Supp. 913, 915 (D. Mass.). None of the objections was of this

[1] "An objection to a complaint, indictment or other criminal process for a formal defect apparent on the face thereof shall be taken by demurrer or by motion to quash, assigning specifically the objections relied on, before a judgment has been rendered by a district court or a trial justice, or before a jury has been sworn in the superior court."

character. No argument is made that they were. The motions to quash were rightly denied.

2. The proper purpose of a plea in bar is to set up a ground, not open under a plea of not guilty, which is an absolute defence, not only at the time of filing but for all time. Examples of appropriate pleas in bar are former acquittal, former conviction, and pardon. *United States* v. *Murdock*, 284 U.S. 141, 151. *United States* v. *Brodson*, 234 F.2d 97, 99 (7th Cir.). *State* v. *Evjue*, 253 Wis. 146, 151-152. Bishop, New Criminal Procedure (2d ed.) §§ 742, 805-809. 14 Am. Jur., Criminal Law, § 262. 22 C.J.S., Criminal Law, § 436. To these may be added the statute of limitations. *United States* v. *Goldman*, 277 U.S. 229. *Capone* v. *Aderhold*, 65 F.2d 130, 131 (5th Cir.). *United States* v. *Franklin*, 188 F.2d 182, 186 (7th Cir.). None of the foregoing defences was raised. The defendants' plea in substance that they cannot be tried on the present indictments will be considered under their pleas in abatement.

3. Ground 2, alleging the presence of unauthorized persons in the grand jury room, was matter in abaement. *Lebowitch, petitioner*, 235 Mass. 357, 362. This was properly raised by plea in abatement, to which there was no necessity for a replication by the Commonwealth. *Commonwealth* v. *Kozlowsky*, 238 Mass. 379, 385, 391. It was not error for the trial judge not to require the Commonwealth to file a demurrer or replication to the pleas in abatement, the only special pleadings now material. As was said in the case last cited, "In the absence of express admission, the matters stated in the plea in abatement were at once in issue" (page 385).

The judge rightly ruled that this ground was valid in law. *Jones* v. *Robbins*, 8 Gray, 329, 343-344. *Commonwealth* v. *Harris*, 231 Mass. 584. *Opinion of the Justices*, 232 Mass. 601. He then ruled against it on the basis of the

affidavit, which was by counsel and stated that on January 13, 1956, "O'Keefe, accompanied by Captain Wilson of the Boston homicide squad, appeared before the grand jury of Suffolk County." At the hearing on the special pleadings counsel for the defendants informed the court that the only source of the contents of the affidavits was the press. Copies of Boston newspapers dated between January 12 and February 9, 1956, were offered by the defendants and admitted as exhibits at the hearing upon the special pleadings. No newspaper has been pointed out to us which sustains this assertion. The quotation above does not.

It is not correct to contend, as do the defenants, that the judge resolved this issue as one of fact. In making his ruling the judge stated that he was not ruling that the issue should be tried before him first, and then, after he was satisfied, before a jury. He said, "All I am ruling is that if you have any evidence that any unauthorized person was present wrongfully before the grand jury . . . this ground will be sufficient. Now, unless you have testimony to that effect, the court is going to deny this particular ground. The court is not going to permit the defendants to go into a fishing expedition on a mere allegation of counsel without any testimony to back it up."

As the judge was then considering the motions to quash, he referred to the affidavits, which, under Rule 46 of the Superior Court (1954),[1] were applicable only to motions. But his consideration of the same question under the pleas in abatement was subject to a statute of similar import: "The court may refuse to receive a plea in abatement or other dilatory plea to an indictment until its truth has been

[1] "The court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, or are apparent upon the record and files, or are agreed and stated in writing signed by the attorneys for the parties interested."

COPY BOUND CLOSE IN CENTER

proved by affidavit or other evidence." G. L. (Ter. Ed.) c. 277, § 74.

4. Ground 3, alleging violation of the secrecy of the grand jury proceedings, by the issuing by State and Federal officials of statements disclosing what witnesses summoned before the grand jury would testify or had testified, is likewise matter in abatement.

When ground 3 was first taken up by the judge on the motions to quash, he ruled that the affidavits did not satisfy the requirements of Rule 46 of the Superior Court (1954); and that in so far as he had any discretion to hear the motions upon the affidavits, or other evidence, he refused to do so, because, assuming that the affidavits were in proper form and substantiated the allegations, and assuming the facts to be true, as matter of law the allegations did not give sufficient grounds for quashing the indictments.

There was no error as to ground 3. No case has been cited or discovered by us which holds that such publicity is a violation of the secrecy of the grand jury room. In Massachusetts, as in England, "the grand jury is deemed to be an informing and accusing body, rather than a judicial tribunal," and the only pertinent statute, which we have, defining their duties is that prescribing their oath of office.[1] *Commonwealth* v. *Woodward,* 157 Mass. 516, 517. *Commonwealth* v. *Harris,* 231 Mass. 584, 586. *Commonwealth* v. *Ventura,* 294 Mass. 113, 120. See *Commonwealth* v. *Hill,* 11 Cush. 137, 139-140; *Commonwealth* v. *Mead,* 12 Gray,, 167, 170.

[1] The oath is found in G. L. (Ter. Ed.) c. 277, § 5: "You, as grand jurors . . . do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge; the commonwealth's counsel, your fellows' and your own, you shall keep secret; you shall present no man for envy, hatred or malice, neither shall you leave any man unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God."

In *Commonwealth* v. *McNary,* 246 Mass. 46, and *Commonwealth* v. *Chmielinski,* 246 Mass. 55, convictions for contempt of court were upheld against the defendants, who had sent to the grand jurors letters which, it was held, could be construed as attempts to interfere with the grand jurors' consideration of matters in which the respective defendants were interested adversely to the return of any indictment. The *McNary* case contains much of interest respecting the duties of the grand jury but nothing which is an authority that the present indictments should be abated. See *Attorney Gen.* v. *Pelletier,* 240 Mass. 264, 307-310.

5. There likewise was no error as to ground 1, which sought to invalidate the indictments because of the publicity outlined above. In *Commonwealth* v. *Woodward,* 157 Mass. 516, *supra,* it was held that a plea in abatement was rightly overruled which raised "the question whether an indictment is to be held bad because one of the grand jurors by whom it was found, being otherwise competent and qualified to serve, had before the meeting of the grand jury made a personal investigation into the guilt of the accused, and had secreted himself in a room with an officer for the purpose of listening to declarations and admissions made by the accused concerning the crime, and had heard such declarations and admissions, and had listened to statements of officers to the effect that the accused was guilty, and had thereupon formed an opinion, and believed him to be guilty before and at the time of the investigation of the case by the grand jury" (pages 516-517). At pages 518-519, it was said, "The indictment is merely an accusation or charge of crime. For the protection of the people against unreasonable accusations there are constitutional and statutory provisions that, with certain exceptions, no person shall be held to answer for crime unless upon indictment. Amendment of Const. of

COPY BOUND CLOSE IN CENTER

U.S., Art. 5. Pub. Sts. c. 200, § 3.[1] This means an indictment found in the usual course of proceedings. It is not however necessary that each grand juror shall be free from bias or prejudice, provided he has the general qualifications which are required. Such a test is not implied either from the terms of his oath or from the nature of his duties. If such an inquiry were open, the delays and complexity of criminal trials would be greatly increased, and no correspondingly useful purpose would be served." To the same effect are *Commonwealth* v. *Ryan,* 5 Mass. 90; *Tucker's Case,* 8 Mass. 286; *Commonwealth* v. *Brown,* 147 Mass. 585; *Commonwealth* v. *Hayden,* 163 Mass. 453, 455.

The court will not inquire whether competent evidence was heard by the grand jury. *Commonwealth* v. *Hayden,* 163 Mass. 453, 455. *Commonwealth* v. *Walsh,* 255 Mass. 317, 319. *Commonwealth* v. *Ventura,* 294 Mass. 113, 120. Before the return of an indictment tried in *Commonwealth* v. *Knapp,* 9 Pick. 496, after the charge was delivered to the grand jury, the accused moved that the court instruct the grand jury as to the nature of the evidence proper to be received by them. The court denied the motion stating: "It is to be presumed that only proper evidence will be laid before the jury. There is a difficulty in determining beforehand what may or may not be proper; and it would be inconvenient, to say the least, to instruct them upon hypothetical cases. The law reposes confidence in the officers of the government in relation to this subject. If any thing improper shall be given in evidence before the grand jury, the error may be corrected subsequently upon the trial before the petit jury" (pages 495-496).

Ground 1, accordingly, discloses no violation of art. 12 of the Declaration of Rights. Upon any decisions of the Supreme Court of the United States which have come to

[1] See now G. L. c. 263, §4 (as amended through St. 1953, c. 319, §28.)

our attention, there was no violation of the Fourteenth Amendment. The commencement of a State prosecution for crime by indictment by a grand jury is not required as "due process of law." See *Hurtado* v. *California*, 110 U.S. 516, 521-522, and the reference to Chief Justice Shaw and *Jones* v. *Robbins*, 8 Gray, 329. See also *Kennedy* v. *Walker*, 135 Conn. 262, 273-274; affd. 337 U.S. 901. There was no problem similar to that in *Cassell* v. *Texas*, 339 U.S. 282. There is nothing which merits discussion with respect to 18 U.S.C. (1952) § 241.

6. The sixth ground and the defendants' exception to setting the trial date may conveniently be considered together. Both are based upon allegations as to news releases and as to statements of enforcement officials, Federal and State. Ground 6 embodies a contention that the defendants never can be tried because they never can be given a trial which is both fair and speedy. The treatment of the special pleadings in the court below presents ground 6 on the basis that there would be no reason for abatement of the indictments even if enforcement officials should be found to have issued any statements and news releases contained in the Boston newspapers and several national magazine articles mostly dated between January 12 and the end of February, 1956. The hearing upon the special pleadings at which the newspapers and magazines were marked as exhibits took place on May 17 and 29 and June 1 and 4, 1956. The motions to quash, pleas in abatement, and pleas in bar were denied on June 4. Some of the indictments had been returned on January 13, 1956, and most of them on January 16, 1956. Also on June 4, the judge set the trial date as August 6, 1956. At that time the defendants objected on the ground that they could not get a fair, impartial, and speedy trial. Although invited to do so by the judge, counsel for the defendants made no motion for a continuance. No motion for change of venue was

COPY BOUND CLOSE IN CENTER

filed, doubtless because of a contention that in no county of the Commonwealth could a fair trial be had.

The newspaper coverage was undoubtedly extensive, and was commensurate with a crime of colossal proportions. In the closing arguments to the jury by counsel for some of the defendants and by the district attorney it was described as "the biggest armed robbery in the history of the country" and "the biggest robbery in history." If there was publicity created by enforcement officials, this was indefensible. It does not follow, however, that the inevitable result is that the defendants must be released, because they can never constitutionally be tried (see *Delaney* v. *United States,* 199 F.2d 107, 112 [1st Cir.]), or that these particular indictments should be quashed. Nor must we conclude that these convictions should be set aside because of the trial date.

Let us consider the issue which faced the judge. From the record of the hearing before him, it is clear that there never could have been a date for trial to which the defendants would not have objected. In substance, theirs was a contention that the period of alleged prejudice to the defendants would outlast the entire time, whatever that might be, during which a trial, properly called speedy, might be had. The judge knew that since January 17, 1950, there had been a public realization that a robbery of extraordinary notoriety had remained unsolved. The boldness of its commission and the record amount stolen could not fail to arouse general interest and to stimulate the channels of public information, such as newspapers, magazines, radio, and television. This was no setting for apathy. The judge, whose opinion is entitled to great weight, was in a better position than are we to evaluate the effect of publicity at the time he set the date for trial. His was the primary duty, which the record shows he understood and undertook to discharge with fairness to the defendants and

to the citizens of the Commonwealth. Realizing that much publicity as to this bizarre crime was inevitable, and that by far the greater part of that of which the defendants complain occurred in the last half of January and in February, the judge in June could reasonably have concluded that its effect had abated or would abate by August to an extent sufficient to permit a fair trial, particularly with the care reasonably expected to be taken in selecting the petit jury. See *United States* v. *Keegan*, 141 F.2d 248, 258 (2d Cir.); *United States* v. *Leviton*, 193 F.2d 848, 857 (2d Cir.).

We cannot say that there was error in dealing with the sixth ground of the special pleadings or that on June 4, 1956, it was an abuse of discretion to select August 6, 1956, as the trial date. See *Commonwealth* v. *Millen*, 289 Mass. 441, 463-464; *Commonwealth* v. *Bonomi*, 335 Mass. 327, 333; 63 Harv. L. Rev. 840, 846-848.

7. On August 6, 1956, the defendants filed further motions to quash, pleas in abatement, and pleas in bar which related to newspaper publications in the interval since the first special pleadings. These were received as exhibits with reference to the new motions and pleas, all of which were respectively denied and overruled. These raise no new point and are governed by what has been hereinbefore said.

8. The defendants excepted to being put on trial on the conspiracy indictment along with the more serious substantive offences. This was matter within the trial judge's discretion of which no abuse appears.

9. The defendants allege error in the examination and selection of jurors, a process which consumed over sixteen trial days from August 7 to 29, 1956. The statistics we take from the defendants' brief. The trial judge examined 1,104 veniremen in open court. He excused 426 who testified that they had disqualifying opinions and 239 because of

COPY BOUND CLOSE IN CENTER

ill health or other reasons. The Commonwealth peremptorily challenged 163 who had been declared indifferent. The defendants exhausted their 262 peremptory challenges on August 29.[1] Before exercising a peremptory challenge the defendants challenged for cause each prospective juror who had not been excused or challenged peremptorily by the Commonwealth. As to each case the defendants asked leave to conduct a voir dire examination, moved that there be put certain questions contained in their "motion for questions to jurors," and made offer of proof of the exhibits of newspaper articles which had been offered at the hearings on the special pleadings. They also offered to prove that if a prospective juror should be asked questions 7, 9, 10, 12, 15, 17, 18, and 19,[1] in the "motion for

---

[1] Genreal Laws c. 234, § 29 (as amended through St. 1955, c. 485, § 1), read: "Upon the trial of an indictment for a crime punishable by death or imprisonment for life, each defendant shall be entitled to twelve peremptory challenges of the jurors called to try the case, and in other criminal cases each defendant shall be entitled to three such challenges; provided, that each defendant in a capital case in which additional jurors are chosen under section twenty-six B shall be entitled to one additional peremptory challenge for each additional juror. In every criminal case the commonwalth shall be entitled to as many such challenges as equal the whole number to which all the defendants in the case are entitled. . . ." See now G. L. c. 234, § 29 (as amended through St. 1957, c. 335), which was enacted upon the recommendation of the Judicial Council. 1956 Pub. Doc. No. 144, p. 42.

[1] "7. Have you read any articles in any newspapers or magazines concerning the Brink's case?"

"9. Have you read or heard that J. Edgar Hoover, Director of the F.B.I., or Herbert Brownell, Attorney General of the United States, or the Departmnt of Justice has said that the Brink's case had been solved and that these defendants had committed that robbery?"

"10. Have you read or heard what J. Edgar Hoover or Herbert Brownell or the Department of Justice has said about how the Brink's case had been solved?"

"12. Have you read or heard what J. Edgar Hoover, Herbert Brownell or the Department of Justice has said about the criminal records and records of arrests of these defendants?"

"15. Have you read or heard how the Brink's case was solved?"

questions to jurors," he would answer in the affirmative. The defendants also excepted whenever the judge declared a venireman indifferent.

In order to understand in proper perspective the exceptions as to the examination and selection of jurors, a close reading of more than 1,500 pages in the typewritten transcript is required. There is thus revealed a patient and careful succession of examinations by the trial judge. Not until the defendants' challenges were exhausted was the first juror seated on the fourteenth day of the trial and the thirteenth day of examining veniremen. Of every one the judge asked the four questions prescribed by G. L. (Ter. Ed.) c. 234, § 28, which reads: ". . . the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein. . . ." Other questions were asked which, in one instance after another, the judge deemed appropriate. Occasionally, but not always, he put questions suggested by the defendants.

The denial of the "motion for questions to jurors" and the refusal to put other questions, to the extent that they were refused, were within the discretion of the judge. Such has been the long standing practice in this Commonwealth. *Commonwealth* v. *Gee,* 6 Cush. 174, 177-178. *Commonwealth* v. *Burroughs,* 145 Mass. 242-244. *Commonwealth* v. *Trefethen,* 157 Mass. 180, 195-196. *Commonwealth* v.

"17. Have you read or heard about the criminal records and records of arrests of these defendants?"

"18. Have you read or heard that Specs O'Keefe has pleaded guilty to participating in the Brink's robbery?"

"19. Have you read or heard that Specs O'Keefe has named these defendants as those who participated with him in committing the Brink's robbery?"

COPY BOUND CLOSE IN CENTER

Phelps, 209 Mass. 396, 414-415. *Commonwealth* v. *Spencer*, 212 Mass. 438, 444-446. *Commonwealth* v. *Snyder*, 282 Mass. 401, 411. *Commonwealth* v. *Lee*, 324 Mass. 714, 717-718. *Commonwealth* v. *Taylor*, 327 Mass. 641, 646-647. *Commonwealth* v. *Bonomi*, 335 Mass. 327, 333-335.

The defendants quote from an opinion of Mr. Justice Holmes in *Commonwealth* v. *Poisson*, 157 Mass. 510, 512, which we fully approve, that this discretion "is exercised wisely by not going beyond the usual questions, unless something appears which makes it proper to go further." They contend that something further appears in the publicity. The determination of this matter was still in the discretion of the trial judge. As was said in *Commonwealth* v. *DiStasio*, 294 Mass. 273, 280, "In this Commonwealth the examination of prospective jurors is 'under the direction of the court,' whether conducted by counsel, or, as is customary, by the judge. Seldom is it permitted to extend beyond the statutory questions. *Commonwealth* v. *Cero*, 264 Mass. 264, 270, 271. Whether other questions shall be asked is discretionary with the judge. *Commonwealth* v. *Millen*, 289 Mass. 441, 475, 476."

We find no abuse of that discretion. It is not enough to describe the conduct of the voir dire as "pedestrian" or "unimaginative." Without surrendering the direction of the examination to the defendants' counsel, who repeatedly asserted that no unbiased jury could be empanelled, the trial judge spent many hours asking questions which must have numbered up into the thousands. This he continued to do even while it was apparent that the defendants would exhaust their 262 challenges before a juror would be accepted.

The defendants argue that they were compelled to use forty-five of their peremptory challenges upon forty-five veniremen who were erroneously ruled to be in-

different. Without extending the discussion, we hold that no harmful error is revealed.

The defendants complain as to two jurymen who, they argue, were erroneously declared indifferent and were seated. Because their examinations are typical of the fairness and the carefulness of the judge's conduct of the voir dire, and mere recapitulation refutes the contention of error, we set them forth at length.

Wolusky was the first juror chosen. The material part of the voir dire was as follows: "Q. [THE JUDGE] Have you formed or expressed any opinion as to the guilt or innocence of any of these defendants? A. I don't have a firm opinion. Q. Are you related to any of them? A. No, sir. Q. Have you any connection whatever with Brinks, Inc.? A. No, I haven't. Q. Have you any personal interest or personal connection with this case? A. No. Q. Are you aware of any bias or prejudice for or against anyone in this case? A. Not that I know of. . . . Q. Have you served on a jury before? A. Yes, sir. THE JUDGE: Then you know what to expect, what is expected of you. . . . The juror is indifferent. . . . COUNSEL FOR THE DEFENDANTS: The same objection and exception and challenge for cause for all defendants. Specifically we object and except to Your Honor's ruling that the venireman stands indifferent, because of the statement that he, and I quote, said, 'I don't have a firm opinion,' which indicates he has some opinion. . . . THE JUDGE: Very well. When I asked you that question I understood that you would be able to take the oath of a juror, to well and truly try the issues between the Commonwealth and the defendants, according to the evidence. That would be uninfluenced in any way by any preconceived notions. . . . THE JUROR: You are right, because I don't convict anyone unless I know the facts, and I don't know the facts." The judge, at the request of the defendants, asked, "Are you acquainted with any of the lawyers

COPY BOUND CLOSE IN CENTER

for the defendants or attorneys for the Commonwealth; and if so, is that acquaintance such as to embarrass you in any way in hearing this case?" To which the juror answered, "I don't know any of them."

The other juryman was Leary, the fourteenth and last juror chosen. The material part of the voir dire was as follows: "Q. Do you know of any reason why you cannot serve on this jury? A. No, Your Honor. Q. Have you expressed or formed any opinion as to the guilt or innocence of any of these defendants? A. I have a tentative opinion; could be changed. Q. You have a tentative opinion. Have you served on the jury before? A. No, Your Honor. Q. If you are accepted as a juror, an oath will be administered to you that you will well and truly try the issues between the Commonwealth and these defendants, according to the evidence, which means that you should serve with an open mind and decide the case purely on the evidence as it will be presented here, uninfluenced by any preconceived notion, ideas, or opinions that you may now have. Do you think you could take that oath and adhere to it faithfully? A. I do, Your Honor. Q. Very well. You are not related to any of these defendants? A. No, Your Honor. Q. And you never had any connection with Brink's in any way? A. No, sir. Q. You have no personal interest in this case? A. None whatever, Your Honor. Q. Are you aware of any prejudice or bias for or against anyone in this case? A. No, Your Honor. Q. Do you know of any reason that would prevent you from reaching a fair and impartial decision or verdict exclusively on the evidence and under the law as the court will give you the law? A. No. . . . COUNSEL FOR ONE OF THE DEFENDANTS: If Your Honor please, before the juror is sworn, since the interrogation has indicated that the juror testified that he had a tentative opinion, but it could be changed, would Your Honor address questions to the juror as to whether or not he knows how much evidence

would be necessary to change his opinion? Q. [By the judge] Mr. Leary, if you are sworn as a juror, you will be instructed by the court that every defendant is presumed to be innocent, and that it will be your duty to bring in a verdict, return a verdict of not guilty, unless you are convinced beyond a reasonable doubt on the evidence and the law that he is guilty. Now, do you think that your opinion, or whatever notions you have, will interfere with carrying out that oath, those instructions? A. No, Your Honor."

There is one other complaint as to the selection of the jury which we shall discuss. This has to do with Jacoby, who was accepted and sworn as the ninth juror. He had stated that he had neither expressed nor had any opinion as to the guilt or innocence of any of the defendants and that he had no bias or prejudice for or against anyone in the case. After being segregated with the other eight jurors for two days, he desired to address the court. He then testified, "I didn't realize it was the Brink's case when I was called, and I have become emotionally upset about this whole business, and I don't seem to fit into the group at all that have already been selected, and I wish to be excused." The voir dire continued: "Q. [By the judge] What do you mean when you say you didn't know this was going to be the Brink's case? Did you have an opinion about the Brink's case? A. I have read in the papers a little bit about it. Q. So that you have formed an opinion about the Brink's case? A. Yes, I have, sir. THE JUDGE: Well, then, the court will excuse you as a juror." The action of the judge was proper. *Commonwealth* v. *Galvin*, 323 Mass. 205, 213-214. At the time no objection was made.

After two more prospective jurors were examined, one of whom was accepted, the defendants moved for a mistrial on the grounds that Jacoby, who had had an opportunity to discuss this matter with other jurors who had been sworn, had been "excused because of an opinion which ap-

COPY BOUND CLOSE IN CENTER

parently he had prior to his being accepted as a juryman." The defendants also moved that the judge interrogate the eight jurymen as to whether there had been any discussions with Jacoby concerning the case. Both motions were denied. Their denial was within the judge's discretion. In *Commonwealth* v. *Phelps*, 209 Mass. 396, 415, it was held, even in a capital case, that a defendant did not have a right to have the jurors who had been sworn and empanelled kept together before the empanelling was completed. In *Commonwealth* v. *Bellino*, 320 Mass. 635, 641, it was said, "We see nothing of consequence in the fact that during the trial fourteen men instead of twelve may have discussed among themselves various aspects of the case, and that remarks of those who subsequently were discharged may have made some impression upon the twelve that remained."

10. The defendants attack a number of miscellaneous rulings in the admission of evidence. None of the evidence complained of was expressly admitted for the purpose of corroboration. The defendants' position is that the witnesses who gave it could have been called for no other purpose than to convince the jury of the truth of O'Keefe's testimony. They object that the evidence did not tend to connect them with the crimes charged, and that the effect of the evidence was to corroborate the testimony of an accomplice on a collateral point not material to their guilt. Reliance is placed chiefly upon *Commonwealth* v. *Holmes*, 127 Mass. 424. Evidence not admitted as corroborative does not fall within the rule of that case. *Commonwealth* v. *Wilson*, 152 Mass. 12, 15. Without unduly prolonging the discussion, it is our opinion that the evidence under attack tended to show the method of carrying out the objects of the armed robbery and the conspiracy to commit it. "Evidence of the attendant circumstances may aid the jury in reaching a verdict by giving them

the complete picture." *Commonwealth* v. *Durkin*, 257 Mass. 426, 428. *Commonwealth* v. *Simpson*, 300 Mass. 45, 50.

11. The defendants assert briefly that it was error not to limit the time to which questions directed to the Witness O'Keefe related, on the ground that the field was opened for irrelevant and collateral matters and the defence was hampered in its cross-examination. This was within the discretion of the judge.

12. O'Keefe testified to two conversations after the robbery. In the latter part of February, 1950, he asked McGinnis for his money, and later by appointment went with Gusciora to a designated place where they met McGinnis and Banfield and obtained two suitcases, each taking one. In his suitcase was $98,000. O'Keefe also testified that subsequent to the discovery on March 4, 1950, of the cut-up truck (used in the robbery) in the Stoughton dump he talked with McGinnis and asked why the truck had been dumped in the very town where Gusciora and he lived, and that McGinnis replied that he did not know that O'Keefe lived in Stoughton. This testimony appears to have been admitted against the defendants generally. The defendants contend that both conversations should have been limited to McGinnis under appropriate instructions to the jury. The first conversation was admissible as showing a disposition of the loot, which was the main object of the enterprise. As to the second conversation the judge in two places in his charge told the jury precisely what the defendants argue that he should have done, namely that the evidence was admissible against McGinnis only.

13. In the cross-examination of O'Keefe he was asked, "Do you know a man by the name of William Kimball?" The question was excluded, and the defendants' counsel made an offer of proof that the answer would be "Yes." The defendants contend that they were precluded from showing the probability that some persons other than they

COPY BOUND CLOSE IN CENTER

committed the crime. There was colloquy at the bench on the day before the ruling was finally made. "THE JUDGE: This is cross-examination and I should give you a wider latitude. If you are going to connect Kimball up, all right, but just merely insinuation wouldn't be enough. Now, I don't want you to disclose your purpose, but leaving it in the air is not enough. COUNSEL FOR THE DEFENDANTS: All I know is that you have said to me, Judge, when I objected, that you assumed that there is going to be something to connect it up. THE JUDGE: That was because I heard the district attorney's opening. I haven't heard any opening from you. Now, if you are going to tell me now that you are going to introduce evidence that Kimball had something to do with this, I will take your word for it. COUNSEL FOR THE DEFENDANTS: The witness asked me—and there was no objection at the time—to name the chief or the boss of this thing, and I am getting ready to do so. ASSISTANT DISTRICT ATTORNEY: Oh, no, no. THE JUDGE: Not unless you have evidence. COUNSEL FOR THE DEFENDANTS: I have an affidavit. What am I supposed to do, introduce it now and let them see it? THE JUDGE: No, but you have got to produce it by credible evidence. I will take your word for it. You don't have to produce for me any affidavit." Later in the colloquy the judge said, "If you tell me that you are going to produce credible evidence in mentioning that name, I will allow you to do it." The defendants contend that the judge made a demand that they produce credible evidence. It is clear from the lengthy quotation we have made that all the judge meant, or could reasonably have been understood to mean, was that counsel, who had made no opening, should merely give his word that he would connect up the evidence.

14. The defendants offered to show through one Humphrey, the manager for Brink's, Incorporated, that a reward had been offered, and published in the Boston news-

papers, for the apprehension and conviction of those who had committed the robbery. The defendants were not permitted to do this, and now contend, although they did not so state at the time of the offer, that this evidence was admissible to show that O'Keefe in testifying was actuated by hope of this reward. It may be observed that as a participant in the crime, O'Keefe could not have become a participant in the reward. *Jenkins* v. *Kelren*, 12 Gray, 330, 332. 46 Am. Jur., Rewards, § 16. 77 C. J. S., Rewards, § 37. Furthermore, in the absence of any statement as to the purpose of the offer, the judge was justified in rejecting it.

15. The defendants, at a time when no witness was on the stand, offered photostatic copies of certain pages of Boston newspapers for various dates in January, 1950. The Commonwealth agreed that these might be used in place of the originals, but made objection on the ground of materiality, and the objection was sustained. The purpose of the offer was to show that O'Keefe could have gained his familiarity with the Brink's premises from plans, diagrams, and descriptions contained in those newspapers. There was no testimony that the plans, diagrams, and descriptions were authentic, or that if O'Keefe ever read them they corresponded with his testimony. There was no error in the exclusion of these newspapers.

16. A chauffeur, called as a witness by the defendants on October 3, 1956, testified that on that date at their request he had driven from the Brink's premises at 165 Prince Street to 14 Bickford Avenue, Roxbury, where Maffie's parents lived, and thence to Egleston Square, near McGinnis's store. This route was that which O'Keefe had testified had been taken by the participants in the robbery. The purpose of the evidence was to show that the defendant Pino could not have been in Egleston Square on the evening of January 17, 1950, at the time witnesses had placed him there and still have been a participant in the robbery. The

COPY BOUND CLOSE IN CENTER

evidence could have been excluded on the ground that the traffic, weather, and light conditions were not shown to be sufficiently similar. No offer of proof was made as to the time the witness took to drive from Prince Street to Bickford Avenue, but an offer of proof was made that it took three minutes to go from Bickford Avenue to Egleston Square. As there was nothing to show the total time for the entire trip taken by the witness, no harm to the defendants is apparent.

17. The defendants Faherty and Richardson raise questions of evidence not applicable to the other defendants.

(a) The other defendants were arrested on January 12, 1956. There was evidence that these two defendants were absent from their homes and customary vocations from January 12, 1956, to May 16, 1956, when they were arrested in an apartment at 87 Coleman Street, Dorchester, by F. B. I. agents, who had Federal warrants for both. They contend that since Federal and State offences are separate and distinct crimes against different sovereigns, even though arising out of the same facts, evidence of flight, hiding, or disguise was not admissible to show consciousness of guilt in favor of either sovereign. The general principle is not contested that evidence of flight of one accused of a crime is admissible as some evidence of consciousness of guilt. *Commonwealth* v. *Brigham,* 147 Mass. 414, 415. *Commonwealth* v. *Goldberg,* 212 Mass. 88, 91. *Commonwealth* v. *Cline,* 213 Mass. 225, 227. *Commonwealth* v. *Corcoran,* 332 Mass. 615, 619. Wigmore on Evidence (3d ed.) § 276. 25 A. L. R. 886. It has been held elsewhere that mere evidence of flight where an accused is charged with more than one offence may be a matter of conjecture. *People* v. *McKeon,* 64 Hun, 504, 506. But where the evidence has probative force with respect to the crime charged, it does not become inadmissible merely because it also tended to show the commission of another crime. *Common-*

wealth v. *Madeiros,* 225 Mass. 304, 314. *State* v. *Bonning,* 60 Mont. 362, 365-366. The robbery with which the defendants were charged violated both State and Federal law. It would be naive to reject the evidence here considered as lacking pertinency as to the crimes of which the defendants have been tried and convicted. We refer to the testimony of the special agents of the Federal Bureau of Investigation that the color of Richardson's hair had become reddish brown instead of grey as usual; the presence in the apartment of loaded weapons, ammunition, a hair cutter, and a bottle of preparation to recolor hair; and the efforts to locate Faherty by television and otherwise. *State* v. *Lucey,* 24 Mont. 295, 303. *People* v. *Ogle,* 104 N. Y. 511, 513-514. *State* v. *Falcone,* 41 R. I. 399, 400-401.

(b) Richardson assigns error that there were not admitted in evidence two records of the United States Commissinoner, District of Massachusetts, of proceedings on complaints dated January 19, 1956, by John P. Larkin, special agent of the F. B. I., one against Faherty and one against Richardson. The charge in each case was violation of 18 U. S. C. (1952) § 1073, in that the defendant "did move and travel in interstate commerce with intent to avoid prosecution for the crime of armed robbery, as defined by the laws of the Commonwealth of Massachusetts, for the commission of which crime a warrant for his arrest had been issued by the Superior Court" for Suffolk County. The records each show that the proceedings taken were on May 16, 1956, that the defendant was presented, and discharged on the recommendation of the government. The record of the trial in the cases at bar shows that these records were offered for identification, and that they were so marked, subject to the exception of Faherty and Richardson. We shall assume that the exception is to failure to admit in evidence. The argument is made that

COPY BOUND CLOSE IN CENTER

these records were admissible on the issue of flight and that the defendants were not hiding from the Commonwealth. It does not appear that this ground of admissibility was brought to the attention of the judge. In any event, the defendant who assigns error was not harmed, because the records would have been certified proof to the contrary of his contention and would tend to show that he had fled to escape the charge of armed robbery made in the Superior Court.

(c) Faherty and Richardson severally assign errors as to statements which F. B. I. agents and police officers testified that each made. We shall not pause to analyze those questions as to which no exception was taken or which are not now argued. Nor shall we unduly extend this opinion by a discussion of evidence admitted without objection and later sought to be struck out because the question was allegedly improper but not because of alleged impropriety of the answer. "The rule generally prevailing in this Commonwealth is that objections to matters of evidence must be seasonably made and exceptions taken when the evidence is offered . . .; and a party cannot of right insist upon saving an exception to evidence by thereafter seeking to have the evidence struck out . . . ." *Commonwealth* v. *Theberge,* 330 Mass. 520, 527. See *Boyle* v. *Columbian Fire Proofing Co.,* 182 Mass. 93, 99, *Commonwealth* v. *Doyle,* 323 Mass. 633, 634-635.

Special agent McNamara of the F. B. I. testified that he interviewed the defendant Richardson at the office of the F. B. I. in Boston. Richardson, asked if he had participated in the Brink's robbery, said that he had not; that he did not know where he had been on that day; and that if he was not working, he was probably drunk. Informed that he did not work, he repeated that he was probably drunk. Asked at what time he left the house in the morning, he said that he probably left at 7:45; and that he

could not recall what bars he went to. He said that he knew Geagan; had been acquainted with Faherty for a number of years; was a close friend of Pino and had worked for him; and that he had known Costa for a great many years, and had worked for him also. The conversation was admissible and the question asking for it was proper. If any portion of the answer was objectionable for any reason, a motion to strike was the proper procedure. *Jacobs* v. *Cromwell,* 216 Mass. 182, 184. *Commonwealth* v. *Anderson,* 220 Mass. 142, 145. *Commonwealth* v. *Rudnick,* 318 Mass. 45, 62. At one point in McNamara's testimony the judge stated that in order to save the necessity of objections by counsel for the other defendants, anything that Richardson was alleged to have said was admissible against him. This was not a ruling that the judge was admitting as evidence anything that anybody might testify that Richardson said, no matter where, when, or in what circumstances.

A similar unreasonable construction is attempted to be placed upon the testimony of one Shanahan, a police stenographer, who transcribed notes of interrogations of Richardson and of Faherty by Captain Wilson of the Boston police. A copy of the stenographic statements had been given to counsel for these defendants, who had marked questions to which he objected. During a long colloquy the latter said, "As to the statement on Faherty, it is obviously imperfect because parts of it are not admissible. He was silent after being confronted with questions." The judge replied, "Anything the man says at any time is admissible," and the assistant district attorney added, "These excerpts of it are." The assistant district attorney said that he would not read the "silent ones." The only other objection was to one question which was contended to be unintelligible. There was no error in these respects. Having stated specifically the basis of their objections, they

cannot urge other grounds in this court. *Kagan* v. *Levenson*, 334 Mass. 100, 107, and cases cited. Wigmore on Evidence (3d ed.) § 18.

18. At the close of the evidence the defendants' counsel directed the judge's attention to certain statements in the district attorney's opening which were said not to be borne out by evidence. At the conclusion of the charge there was no exception taken on this matter. Assuming the question to be open, we note the contention that it was error not to instruct the jury to disregard those statements. We do not agree. Near the beginning of the charge the judge said, "Of course, as I said before, what counsel—and I mean now the district attorney as well as counsel for the defendants—say to you in their openings and through the course of the trial, or in their summations, is not evidence. You are to judge the case, weigh the case absolutely on what evidence has been presented here during the trial." Similarly, statements had been made by counsel during the course of the trial. For example, the district attorney near the beginning of his opening had made a clear statement that the opening was not evidence but merely a preview of what the Commonwealth expected to prove. After the Commonwealth had closed its direct case, counsel for the defendants stated to the jury, "the district attorney of Suffolk County, who opened for the Commonwealth—and I might say opened in a very proper and intellectual manner—instructed you people generally in his opening as to what an opening meant."

19. At the conclusion of the district attorney's closing argument, it having been agreed that objections would have the same effect as though taken during the argument, counsel for the defendants orally requested the judge to instruct the jury to disregard certain portions thereof. The judge denied most of these requests, and saved exceptions to the denial. In these circumstances, failure to

renew the exceptions at the close of the charge was not fatal. *London* v. *Bay State St. Ry.*, 231 Mass. 480. *Doherty* v. *Levine*, 278 Mass. 418, 419-420. *Heina* v. *Broadway Fruit Mkt. Inc.*, 304 Mass. 608, 610-611. *Commonwealth* v. *Domanski*, 332 Mass. 66, 70-71. Cf. *Commonwealth* v. *Cabot*, 241 Mass. 131, 151.

(a) The first group of exceptions concerns references to the Federal Bureau of Investigation; to Agent Powers, the head of its Massachusetts district; and to Agent Larkin. These two agents did not testify, but many of the bureau's employees did. The bureau had been mentioned many times in the course of the trial. O'Keefe had testified that he had first told his story to Agents Powers, Larkin, and Kehoe. In the arguments of two of the defence counsel, the F. B. I. had been portrayed or named in terms which, even on a mild construction, were quite derogatory. In the wake of such arguments, the district attorney could, without impropriety, refer to Powers and Larkin, who had been associated with the prosecution, and to the Federal Bureau of Investigation, and to its aims and ideals. It is inaccurate to charge that the district attorney injected the F. B. I. into his argument.

(b) The defendants assign error in the refusal of the judge to instruct the jury that there was no evidence certain bags were "peculiar to longshoremen." There was no error. To begin with, the district attorney did not use this expression. What he said was: "[W]ho could get those bags? Where would you get bags like those with the names of a foreign country on them? Who could get them? Geagan? Yes. Geagan and Richardson." There was evidence that two bags marked as exhibits were found on the dump at Stoughton with the pieces of the destroyed truck. O'Keefe testified that "Richardson and Baker were told that they would have to carry in the bags that we were to use to carry out the stuff. . . . Tony [Pino] spoke

COPY BOUND CLOSE IN CENTER

to Geagan and Richardson and said that in view of the fact that they had access to the type of bag we wanted, they should procure them. . . . They both said they would do that." O'Keefe identified one of the bags as being "one of the bags that we took there . . . [or] a brother to it."

(c) Error is assigned that the judge refused "to instruct the jury specifically with reference to the $60,000 referred to by the district attorney in his closing argument as 'trouble money' that it was introduced solely with respect to the issue of robbery but was not connected with any of the defendants." What the district attorney said was, "You remember the testimony of Specs O'Keefe when he said, 'We took $10,000 and we put it aside. It was trouble money that could have been detected. It could have been readily detected because it was new money.' That was the money that McGinnis was to destroy. You will have approximately $60,000 of that money, Mr. Foreman and Gentlemen of the Jury, and there are the ten $1,000 bills."

There was no error. O'Keefe testified that they counted the money at the Maffie house immediately after the robbery; that one package contained ten $1,000 bills in new money; that there was $96,000 or $98,000 of new money (whether in addition to the $10,000 is not clear); that they did not "figure" that they would be able to use it, and that the $10,000 (at any rate) was put upon the mantel piece, later to be destroyed; that McGinnis said that it was a shame that they could not use that money, and suggested running it through a washing machine with coffee for color to make it look old; and that everybody there said that that was not practical, and that they wanted it burned.

(d) There was no error in refusing to instruct the jury that there was no evidence that the defendants Faherty and Richardson were potential murderers. There was testimony that when they were captured they had loaded guns.

The district attorney had argued: "Now, Faherty and Richardson. Let's see where they were, Mr. Foreman and Gentlemen of the Jury. And when you go in there, I want you to take this little instrument with you. They are not gunmen? They are not potential murderers? They are not robbers? Well, Mr. Foreman, take that little weapon and swing it around so that you can look in there. These guns were loaded."

(e) There was no error with respect to the district attorney's reading from *Commonwealth* v. *Webster*, 5 Cush. 295, 319, "This [an alibi] is a defence often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny." The judge refused to instruct the jury specifically that this quotation should not be considered by them as the law. He did, however, give a general instruction, in substance, that it was the duty of the court to instruct on the law.

20. The defendants assign error that the judge failed to charge that there was no evidence corroborating O'Keefe. They concede that there is no rule of law in this Commonwealth that such instructions be given. There was no error in this respect. See *Commonwealth* v. *Wilson*, 152 Mass. 12, 15; *Commonwealth* v. *Bishop*, 165 Mass. 148, 150; *Commonwealth* v. *Phelps*, 192 Mass. 591, 595; *Commonwealth* v. *Leger*, 264 Mass. 217, 220; *Commonwealth* v. *Lammi*, 310 Mass. 159, 164-165. We do not intimate that such corroborative evidence was lacking.

21. The defendant McGinnis, who was charged in certain indictments with being an accessory before the fact, assigns error in that the judge refused to instruct the jury that he could be found guilty only if he committed accessory acts on or after December 16, 1949, or if St. 1955, c. 781, was unconstitutional as ex post facto, on or after January 16, 1950. His contention, for which he states he

has found no authority, is that the "offence is completed on the date on which the accessory last incites, procures, aids, counsels, hires, and commands the prinicipal to commit the substantive offence, and not on the date when the substantive offence was committed." We do not accept this contention. "One becomes an accessory before the fact by the commission of a felony by another whom he has urged to commit it." *Commonwealth* v. *Bloomberg*, 302 Mass. 349, 356. McGinnis became an accessory by the commission of the several crimes by the respective principals on January 17, 1950. This was within the six year statute of limitations contained in G. L. (Ter. Ed.) c. 277, § 63, before it was amended to ten years by St. 1955, c. 781, which took effect on December 15, 1955. *Imholte* v. *United States*, 226 F.2d 585, 589 (8th Cir.).

Judgments affirmed.

Appendix C

HEADLINES AND SUB-HEADLINES AND SAMPLES OR SUMMARIES OF, OR EXCERPTS FROM, SOME OF THE PERTINENT NEWS ARTICLES AND EDITORIALS

A. PRE-INDICTMENT PUBLICITY

"BRINKS HOLD-UP SOLVED" (Ex. A, pp. 7-8.)
"EXTRA, EXTRA, BRINKS HOLD-UP SOLVED" (Ex. A, p. 9.)
"BRINKS ROBBERY SOLVED AS SPECS O'KEEFE TALKS" (Ex. A, p. 12.)
"FBI: THIS IS HOW IT HAPPENED" (Ex. A, pp. 23, 28.)
"Million Dollar Loot Spent by Gang—Not a Cent Recovered" (Ex. A, p. 12.)
"Officials Say O'Keefe is 'Very Cooperative'" (Ex. A, p. 16.)
"6 Bandits Put in Jail Here" (Ex. A, p. 18.)
"Brinks Case Broken by F.B.I. with Arrest of Six Tied to $1,218,000 Cash Robbery" (Ex. A, p. 47.)

Under those or similar headlines, there were stories that O'Keefe told FBI agents the "inside" story of the fabulous holdup; that O'Keefe not only named himself as one of the Brink's bandits but "laid out the underworld's greatest secret in such detail that those checking the story could not find a single act that went unsubstantiated";[1] that this "enabled the FBI to electrify the nation with the announcement of the solution of the fantastic robbery": that United States District Attorney Julian worked inces-

[1] O'Keefe was being held incommunicado. His contact with the press could only have been through federal and state enforcement officials.

COPY BOUND CLOSE IN CENTER

santly for three days and three nights before the sensational announcement could be made yesterday by J. Edgar Hoover that the 'Brink's Robbery is Solved' "; that Julian had "announced that extra security measures for all who might be hurt as a result of the solution, had been taken"; that McGinnis was named by O'Keefe as a leader in the formulation of the robbery; that an FBI spokesman in Washington said, "None of those rounded up went off on a wild toot— not a one of them. But those boys can spend money awfully fast"; that Byrne and his staff and FBI agents and Boston Police grilled O'Keefe for hours and they said O'Keefe was "very cooperative"; that at 8:45 p.m. on January 12th Byrne said, "O'Keefe will be a principal witness before the Grand Jury tomorrow"; that "a police official" said (on the evening of January 12th), " 'Specs will have no chance to talk to anybody unless it's to us. He is a very special person and we intend to treat him as such' "; that United States Attorney General Brownell said that the case would be given to the state because punishment would be heavier. (Ex. A, pp. 12, 13, 15, 16, 102.)

There were also stories that District Attorney Byrne said, "O'Keefe was the trump that the Commonwealth was holding last night. He was singing long and loud"; "that Specs is going through all the way"; that Assistant District Attorney John McAuliffe attributed O'Keefe's talking to "the falling out among thieves"; that McAuliffe said, "O'Keefe felt he got a raw deal from the others and talked"; that McAuliffe said Specs gave a "detailed account of how the robbery was planned and carried out"; that McAuliffe called the story "fantastic to put it mildly"; that at 7:30 p.m. (January 12th) District Attorney Byrne disclosed that presentments were being drafted by clerks and police stenographers naming all suspects for con-

spiracy, armed robbery, possession of firearms;[2] that the United States Grand Jury had failed to return indictments because they could not use wire and tape recorded testimony but that the state procedure is more liberal with reference to evidence; that the FBI "having now released its solution the next step will be taken in the State Courts"; that a series of mysteries plagued the Brink's case; that the homicidal deaths of Carleton M. O'Brien and George D. O'Brien and the disappearance of John Carlson were connected to the Brink's case;* that District Attorney Byrne said: "I believe Carlson is dead. Carlson disappeared a short time after he was up here to see us."* (Ex. A, pp. 47, 50, 51, 53, 58, 60, 61, 64, 67, 70.)

Also reported were stories that an investigator attributed O'Keefe's talking to "the old story of one of the mob getting peeved"; that O'Keefe "griped" that he never got his fair share of the loot; that O'Keefe claimed that the Pennsylvania Police (who arrested him in June, 1950) were tipped off that guns were in his car; that appellants were "dangerous and resourceful men"; that the FBI believed the gang guilty from the start; that the "G-men were not dealing with 'neophytes' but with hardened criminals";* that there was "murder, jail delivery, silence in Brink wake";* that the Danvers robbery (sic) opened up a new cross current in the case;* that someone imported "Killer" Burke from New York to wipe out O'Keefe;* that O'Keefe had "talked like a bird";* that an investigator said he understood O'Keefe had never received his due from the fellow members of the Brink gang and wanted revenge now that the statute of limiations would apply in a few hours; that Byrne denied that any "deal" had been made for O'Keefe's cooperation; that O'Keefe's statement

---

[2] Even before the grand jury was convened.

* There was no such evidence offered by the government or admitted at the trial.

COPY BOUND CLOSE IN CENTER

was described by Byrne as "fantastic". (Ex. A, pp. 18, 19, 20A, 25A, 28, 30A.)

Under a headline, "Brink's Timetable", the deaths of Carleton M. O'Brien and George D. O'Brien, and the disappearance of John Carlson, were listed together with the dates on which those events occurred and all of those events were linked to the Brink's robbery.* (Ex. A, pp. 18, 19, 20A, 25A, 28, 30A.)

Still another paper under a headline, "LAW OFFICIALS ELATED", quoted various Massachusetts officials:

Andrew J. Trodden, assistant Attorney General of Massachusetts, said, "If this thing ends in convictions and as a result most of these men are put away, it will cut down a great deal of criminal activity in this field. The fact that this big robbery was not solved has almost been a feather in the cap of the underworld. The assurance that this thing has now been broken is bound to give the whole community a lift."

Captain Crescio, chief of Massachusetts State Police Detectives, said, "Anything like this has a tendency to make the little hoodlum worry about his possibilities of getting away with a crime. It is certain to have a great effect on law enforcement in general."

Captain Joseph McEneney, public information officer of the Massachusetts State Police said, "This is quite a feather in the cap of law enforcement. It is bound to have a considerable effect on criminals, particularly on the young people among them, and perhaps in a lesser degree on the hardened types. They have said for some time now that the police can't solve anything. There has been a feeling close to contempt for law enforcement. This shows them that they are wrong. Possibly many of these potential or

* There was no such evidence offered by the government or admitted at the trial.

actual criminals will now think twice. It is sure to sober them up anyway."

John Coughlin, Chairman of the Massachusetts Youth Service Board said, "There is certain to be a chain reaction to this Brink's robbery solution not only among young people but also among adults. When people find out they can get away with a law violation even adults will tend to say what's the use of going straight . . . This Brink's robbery has been publicized in the newspapers and even in the movies. It must have glamorized and glorified these criminals in the minds of many. Certainly this has been the major crime of our time, planned, rehearsed and executed carefully. For solving it we congratulate law enforcement officials and everybody who has had a part in bringing this case to justice."

Thomas J. McArdle, counsel for the Massachusetts Crime Commission, agreed that the solution of the Brink's crime would tend to have a good effect on law enforcement and community morale in general. (Ex. A, p. 102.)

The Mayor of the City of Boston was quoted in many newspapers, "I think the FBI should be highly commended for its tenacity and perseverance in solving the case. At long last this robbery has been solved as I always thought it would be. It is wonderful news." (Ex. A, pp. 47, 53, 60, 61, 68.)

"BENEATH THE MASKS"

"Announcement of the *solution of the Brink's robbery* only five days before the expiration of the old state statute of limitations does not of course guarantee *conviction of the men who staged the largest cash haul in American criminal history.* That is the next step to be fought in the courts.

"The stain of the Brink's robbery is still not erased. It will be a long time before this crime, a complete triumph

COPY BOUND CLOSE IN CENTER

for the underworld is forgotten, and before the reputation of Boston for law and order with which it is coupled is vindicated.

"Stern and courageous prosecution lies ahead. *These figures* emerging from behind the Halloween masks that they wore on the night of Jan. 17, 1950, *are* not heroic figures, but *desperate and lawless men.* And that is the dreadful aspect of the Brink's robbery—*that a few punks could for almost six years remain at large unpunished for the world's greatest robbery.*" (Ex. A, p. 12.)

"THANKS, MR. HOOVER"

"The announcement *of the solution* is a great relief to Boston. The case gave the city more publicity than anything since the Boston Tea Party. But it was the wrong kind of publicity.

"The FBI has done Boston and the nation another fine service. Boston can now be forgotten as the 'home of the greatest unsolved crime in the history of the country.' Thanks, Mr. Hoover". (Ex. A, p. 18.)

"THE BRINK'S BAG"

"All of us owe a resounding voice of thanks to the FBI for cracking the Brink's case.

"The successful action of J. Edgar Hoover and his organization has removed some of the shame and stigma that had been created by the crime.

"It remains, of course, the record-breaking robbery. But it will be better to have the record-breaking robbery marked 'Solved' than to have it sit on the books for year after year as a testimonial to police failure.

"While the Brink's job stayed unsolved, it remained a challenge to a gamut of characters from corn-loving comics to reefer-smokers and imaginative bandits.

"It had become old stuff to refer to Boston as the place where a hooded gang could walk in with empty pockets and stroll out with more than a million dollars. Now, at least, the retort can be; 'Perhaps, but in the end the FBI gets them all.'

"What of the gang that pulled the fantastic trick? Were they master criminals? Not at all. A well-known hood or two, a little-known hood or two, a couple of seasoned gunmen—in short, about what any cop could expect to find by raiding a gang meeting in a dirty back room.

"Why, then, did it take six years to catch them? Perhaps we'll never know the full story about that. For now, we'll say no more on that angle except that they're caught (most of them) and we're heartily glad.

"And what of their profits? What did they get as their split-up share in the biggest robbery on record? They got six years of glancing over their shoulders, of suspicion, of doubt, or uneasiness. Some of them got a respite in prison. Not one of them got a station in life any higher or more pleasant than the low spot he occupied on the night of the crime.

"Six years after the crime, six of the men were still in Boston when they were arrested by the FBI. One was dead, two were in prison and two were still on the lam.

"We share the satisfaction of the FBI in seeing the case broken." (Ex. A, p. 46.)

"COLLAPSE OF A CRIME BALLOON"

"There are good reasons for Boston's gratification over the Federal Bureau of Investigation's report that the fabulous Brink robbery has been solved.

"For six years the city and Bay State has been embarrassed by the national attention they received as the site of a $1,219,000 cash robbery of an armored car company. A three-pronged investigation by city, state and fed-

COPY BOUND CLOSE IN CENTER

eral authorities turned up suspects galore but not enough evidence to warrant indictments.

"The fact that all of the accused men lived in the Boston area both before and after the robbery is unsettling to Bostonians, who are told that a crime of such proportions was planned and rehearsed for a year without police detection. Furthermore, the accused men have lived in the area for six years without becoming more than suspects.

"Whether or not the arrests represent a total solution of the crime remains to be seen at the trial. The time limit for prosecution has nearly run out. So the arrests may signify a decision to go ahead with what is known, even if it turns out incomplete.

"The Suffolk County District Attorney's office now has the responsibility of pursuing the case with a vigor equal to that of the F.B.I. Unfortunately, the federal statute of limitations on the actual crime ran out three years ago.

"Removal from the Boston scene of even a handful of criminals capable of crimes of this magnitude would be cause for gratitude. The Brink's case no longer symbolizes criminal success. It underlines anew the familiar proposition that crime does not pay, regardless of how brazenly it argues for a time that it has.

"Thanks largely to the unflagging determination of the Federal Bureau of Investigation, the air has been let out of the big crime balloon. The audacity of the robbers is overshadowed by the steadily dawning brilliance of detection and law-enforcement." (Ex. A, p. 103.)

"CASE OF MR. B"

"The Federal Bureau of Investigation is certain that it has solved the crime which for nearly six years has been the underworld's boldest, mocking challenge of the law.

"If the Brink's robbery is solved, this is perhaps the finest of the FBI's many accomplishments in the field of

crime detection. Conviction of the guilty will be a major blow to gun hoodlums everywhere and a deterrent of equal proportions.

"J. Edgar Hoover's agents never eased up their pressure for the solution of the case that came to be called 'Mr. B'. When active investigation by local authorities sputtered to a standstill, the FBI only increased its efforts.

"In turning the case over to Suffolk County for prosecution, the Department of Justice paid a compliment to District Attorney Byrne and his staff. Mr. Byrne has moved for swift process of law. The accused are entitled to speedy trial and should get it." (Ex. A, pp. 117-118.)

Under a headline, "EXCLUSIVE: O'KEEFE'S OWN STORY OF BRINK'S CRIME", there appeared O'Keefe's own story as told to "police officials." He "opened his statement by saying how the gang had planned the Brink's robbery for more than a year and a half. The plan was 'to take the Brink organization'. He related how they had 'cased' what he called 'the old joint' on Federal Street. He said they had formed plans to 'grab a safe there' but ultimately abandoned the project on the grounds it was 'too hot'. O'Keefe told how the building was under 'almost constant surveillance by the gang both night and day during their study of the operation. O'Keefe then told D.A. Byrne and others how the Brink plant was watched on numerous nights until after the work there had been ended. Then they knew that the only one present was the watchman. He then told how the gang entered the plant night after night through the garage, . . . 'On the night of the robbery Joseph McGinnis was not "in" on the actual holdup.' O'Keefe said. 'McGinnis did not "show" for the raid, we met him later,' O'Keefe explained. Seven of us including myself did the actual job inside. One man was outside in a Ford and two others were in the truck that was used. O'Keefe said the truck was brought along to

COPY BOUND CLOSE IN CENTER

park, ... O'Keefe told how the men entered the money gate. 'We had keys for everything,' said O'Keefe. He said the money was put in 'burlap hampers' and those were carried down and loaded into the truck. They drove directly to a Roxbury house he said. He named the house . . . . O'Keefe said another truck was used too by McGinnis and Banfield to take the 'dough' to another point. He said he did not know the whereabouts of that second place, ... He said the original plan the night the money was counted called for the money to be divided with each receiving one hundred thousand dollars plus. O'Keefe said when he got his money from McGinnis 'he felt he had been gypped of quite a few grand.' He beefed at the time he said. O'Keefe said he turned his end over to Adolph Jazz Maffie to hold for him. 'I got gypped I never got it, it was the last I ever saw of it,' said O'Keefe. O'Keefe said he continued to beef from time to time both for his dough and for the shortage. He admitted being shot at twice in Dorchester.* I imagine it was because I was beefing, he said.* At this point in O'Keefe's story the talk was directed to the time he was ambushed by Elmer 'Trigger' Burke. 'He was not in on the job,' said O'Keefe, 'in any way'. O'Keefe indicated that Burke was brought in 'to take care of O'Keefe for his beefing'.* At this point O'Keefe continued, 'there was no inside connection, we had keys to every lock in the joint. We had a complete lay-out and we didn't need an inside man'.'[3] (Ex. A, p. 40.)

Under a bold-faced heading, "EXTRA GUARDS SET TO BLOCK JAIL BREAK", there appeared a story that appellants were expected to attempt to break out of the

[3] O'Keefe was being held incommunicado. His contact with the press could only have been through federal and state enforcement officials.

* There was no such evidence offered by the government or admitted at the trial.

Charles Street Jail where they were then being confined.'" (Ex. A, pp. 33, 37.)

Under the caption, "O'KEEFE THINKS BURKE KILLED TWO MEN LINKED TO BRINK'S HOLDUP CASE. TELLS BYRNE TWO ATTEMPTS MADE ON HIS OWN LIFE",* O'Keefe was quoted as having told the district attorney and police officials that a New York mob was told to hire "Trigger" Burke and send him here to knock off O'Keefe;* that Burke killed Morris (Whitey) Hurwitz of Brookline;* that two attempts had been made to kill him (O'Keefe);* that "the official said *that not only was O'Keefe talking, but his story was so detailed that it could have come from one who was on the inside of the Brink's job both in its planning and its execution;* that O'Keefe was bitter at the other members of the gang and that was "what furnished the lyrics and music for the song Specs O'Keefe sang today." (Ex. A, pp. 61, 68.)

Under a headline, "O'KEEFE'S FEAR FOR HIS LIFE CONVINCED HIM TO TELL ALL", it was reported that a gangland message sent through the grapevine to the effect that "we'll get you good when you get out" convinced O'Keefe to tell the FBI all;* and that O'Keefe was also quoted as saying that endless planning and great detail went into the execution of the robbery and "we didn't overlook a bit". (Ex. A, p. 105.)

Under a headline, "GANG KILLINGS TIED TO BRINKS", and a sub-headline, "Cops Reopen Two Hub Cases, Third In Rhode Island," there appeared a story summarizing the homicidal deaths of one "Whitey" Hurwitz, John Carlson, James Bratsos and Carlton O'Brien and stating that "authorities" have new evidence indicating that there were direct links between the Brinks case and several of the unsolved killings.* Pictures of the de-

* There was no such evidence offered by the government or admitted at the trial.

COPY BOUND CLOSE IN CENTER

ceased persons were carried underneath which appeared a caption "Did they die because they knew too much?" (Ex. A, p. 113.)

Under a headline "KEY BRINKS OFFICIAL IS THREATENED", appeared a story intimating that an unnamed official had been threatened.* (Ex. A, p. 114.)

Under a headline, "SECOND TALKER MAY JOIN SPECS", there appeared a story that another Brink's suspect was ready to crack and that "last night the confident prosecutor (District Attorney Byrne) did not deny that Specs will be joined by another of the suspects in turning state's evidence"* (Ex. A, p. 108.)

Under a front page headline, "SAY GUSCIORA TALKING", and a sub-headline, "Convict Joins O'Keefe in Telling All," there appeared a story to the effect that according to one official, Gusciora, one of the defendants, was ready to talk.* (Ex. A, p. 110.)

Under a headline, "THREATENS BRINKS MAN DON'T TALK A ROUGH VOICE TELLS MANAGER", there appeared a story that "the underworld was striking back",* that at least three possibly five murders had been linked by investigators to the Brink's case;* that O'Keefe's story told yesterday had caused the reopening probes of three and possibly five murders; that such disappearances and murders have given officials reason enough for mounting heavy guard over eight Brinks suspects and others involved in the case."* (Ex A, p. 109.)

Under a headline, "THREATEN BRINKS WITNESS", there appeared a story that "an important witness for the state in the Brinks robbery has been warned not to talk,* police revealed today." (Ex. A, p. 121, 123.)

Under a headline, "BRINKS CASE CALLED AIRTIGHT, U.S. JURY TO SIT, ELEVEN INDICTED IN

* There was no such evidence offered by the government or admitted at the trial.

SUFFOLK," and a sub-headline, "McGinnis Alibi Mystery Ended", appeared a story to the effect that "the FBI and District Attorney Byrne moved swiftly and decisively yesterday and 'sewed up' the case against the Brinks bandits. They had full admission of participation in the robbery by one of the masked men, O'Keefe. They developed evidence corroborating O'Keefe". The story continued that O'Keefe had said that the reason he went before the grand jury was, "I want to straighten things out with my family because twice I escaped death from the gang's guns";* that Lieutenant Crowley of the Boston Police Department had been "set up" to provide an alibi for McGinnis who, according to O'Keefe, master minded and pulled the strings for the robbery; and that O'Keefe said he talked to save his own life".* (Ex. A, p. 111.)

Under a headline, "BOMB HUNTED NEAR SPECS CELL," and another headline, "REPORT DYNAMITE PLOT TO SEAL O'KEEFE'S LIPS", stories appeared to the effect that anonymous telephone calls had been received telling of the proposed bombing of O'Keefe's jail cell in order to seal his lips.* (Ex. A, pp. 134, 135, 139, 145.)

Included within one of the foregoing stories were "FBI disclosures" of a new Brink's witness who reportedly supplied them with corroborating evidence and of a purported telephone threat directed to a victim of the robbery who had also testified before the grand jury,* and reports from "top investigators" that others of the Brink's suspects might follow the lead of O'Keefe and turn state's evidence.* (Ex. A, p. 145.)

Under a headline, "LINK BRINK GANG TO BURKE BREAK," there was a story linking Elmer "Trigger" Burke's escape from the Charles Street Jail with appellants.* (Ex. A, p. 164.)

---

* There was no such evidence offered by the government or admitted at the trial.

COPY BOUND CLOSE IN CENTER

Under a headline, "BRINKS DANVERS LINK BARED", there appeared a story that a new disclosure and other important developments together with information that the FBI has, "definitely established links between the Danvers robbery and the Brinks theft."* (Ex. A, p. 148.)

Under a headline, "MAN SLAIN IN GEORGETOWN, BRINKS CONNECTION IS WEIGHED", there appeared a story about the slaying of a man in Georgetown and the possible link between that murder and the Brinks case.* (Ex. A, p. 160.)

B. PRE-TRIAL PUBLICITY

A. Prior to May 29, 1956, when the hearing was held on petitioners' first special pleadings[4]

One story stated that "authorities" suspected that the Brink's defendants "after importing Burke to ambush O'Keefe, had to spring him from jail to make sure he didn't talk."* (Ex. A, p. 193.)

In a story dealing with the arraignment of appellants, it was said that appellants "were given all the precautions normally accorded dangerous criminals on the strength of their record." (Ex. A, p. 183.)

There was a story that "new evidence in the $681,000 Danvers armored car robbery linking it with the Brinks case,* will be presented to a special grand jury, Department of Justice officials said today." (Ex. A, p. 179.)

Under a headline, "O'KEEFE KIN GUARDED BY DAY, NIGHT," there was a story that members of

[4] Material to this issue is, of course, all of the pre-indictment publicity.

* There was no such evidence offered by the government or admitted at the trial.

O'Keefe's family were under guard and that "several government officials have announced they were convinced there is a definite link between the two robberies (Brinks and Danvers)".* (Ex. A, p. 206.)

Under a headline, "TIE FIVE MURDERS TO BRINKS CASE," it was reported that "Suffolk County investigators revealed that one tip was to the effect that missing bodies are buried under clam flats outside of Boston, and that the Brinks robbery investigation, now largely a hunt for loot, may extend to a search for bodies."* (Ex. A, p. 213.)

Under a headline, "SECOND BRINK ASKS DEAL TO TALK," there was a story that "investigators" had stated that "a second member of the Brinks robbery gang has indicated a willingness to talk, provided he can make a deal with authorities for protection to himself and family and a light prison sentence"; and that "we expect to get the man's statement very soon to back up completely the story of the planning and actual robbery as told to us by O'Keefe."* (Ex. A, p. 217.)

Under a headline, "O'KEEFE GIVES NEW LEAD ON SOME BRINKS CASH", there was a story that O'Keefe had spent an hour in conference with District Attorney Byrne and detectives and that "officials" said, "O'Keefe has not only furnished enough information to break the Brink's case, but has given new leads to the solution of the Danvers armored car theft."* (Ex. A, p. 223.)

District Attorney Byrne was quoted as saying, "So far, everything O'Keefe's told us has been checked and found to be accurate." (Ex. A, p. 217.)

Under a headline, "HUB POLICE NOW GUARD TWELVE OF THE BRINKS WITNESSES", "local

* There was no such evidence offered by the government or admitted at the trial.

officials" said that these witnesses would "sew up the case against the nine defendants. Their stories will supplement those of O'Keefe's." (Ex. A, p. 233.)

Under a headline, "PINO SHIFT FOILS ESCAPE PLOT", there appeared a story that "gangland had plotted a repetition of the bold delivery of Burke,"* and that Byrne had conferred with Corrections Commissioner Oswald and arranged for Pino to be removed to a jail fifty miles away under heavy guard. (Ex. B, pp. 253, 524.)

Under front page headlines, "FIVE MURDERS LINKED TO BRINKS," "FIVE UNSOLVED SLAYINGS TRACED TO BRINKS ROBBERY," there appeared stories that the "Brink's investigation had disclosed that at least five persons who knew too much about the robbery were slain because of the knowledge of the crime according to information given to authorities within the past two days;"* that an "official declared that he has good reason to accept the account of the execution of the five men given to him by an unnamed source"; and that the informant had told investigators they "were given the gangland's foolproof, water-cooled, and sand-hardened burial; and that those buried in the sand "should stay buried without any fear that the body will rise from the sand."* (Ex. B, pp. 265, 268.)

Under a headline, "O'KEEFE'S SISTER TALKS, BACKS BROTHER'S STORY", there was a story that O'Keefe's sister had been "thoroughly cooperative" and had "provided evidence supporting her brother's participation in the robbery and his accusations against his ten alleged accomplices in the raid."[5] (Ex. B, p. 300.)

Under a headline, "BRINK'S LOOT LINKED TO SUICIDE", there was a story to the effect that District

---

[5] At no time during the trial did the government offer any relative of O'Keefe as a witness.

* There was no such evidence offered by the government or admitted at the trial.

Attorney Byrne stated that he had been informed by his investigators that Joseph Venuti, who had just committed suicide, had been entrusted with $100,000 of the loot and that his information was that McGinnis turned over the money to Venuti.* That same story reported that an attractive blonde woman claiming to be an emissary of Elmer "Trigger" Burke, offered to trade information for Burke's life; that investigators had been trying to determine whether she had been authorized to make the offer; that Burke was "conceded" to have known about the Brink's robbery through his having been 'imported' to Boston by members of the gang to wipe out O'Keefe and his close pal Carlson;* and that investigators believed that Burke's testimony could be convincing at the trial of the gang. (Ex. B, p. 329.)

Under a headline, "CAPE MAY YIELD BODY, BRINKS CASH", there was a story, attributed to state police and investigators for District Attorney Byrne, to the effect that Carlson's body was buried in sand down the Cape;* that Captain Wilson and Detectives Howland and Barry were driving down the Cape to uncover the bodies; and that O'Keefe had stated that he had been visited in jail just a few days before he "admitted participation" in the robbery and was offered a substantial sum of money to keep quiet.* (Ex. B, p. 343.)

In another story, District Attorney Byrne was quoted as saying that Carlson was killed "because O'Keefe had told him details of the Brink's case, details which could have brought about the round-up of the robbers in short order if they had reached official ears;"* and Captain Wilson was quoted as saying, "There is some chance we may find some of the Brink's loot in addition to Carlson's burial plot, in the sand."* (Ex. B, p. 345.)

---

* There was no such evidence offered by the government or admitted at the trial.

Under a headline, "BLONDE BRINKS LOOT WITNESS UNDER GUARD" and a sub-heading, "Woman in Protective Custody Saw Batch of Stolen Money Counted," and a headline, "BLONDE SAW BRINK'S LOOT DIVVIED UP", there were stories that a blonde Boston woman would be a witness; that she had seen the stolen money counted and divided; and that she was one of several witnesses that lead FBI director J. Edgar Hoover to announce that the Brink's robbery was solved.* (Ex. B, pp. 353, 355.)

Under a headline, "O'KEEFE GIVES UP BRINK LOOT", there appeared a story to the effect that several thousand dollars worth of the Brink's loot had been recovered from a cache where Specs hid it for six years;* that O'Keefe told investigators from the District Attorney's office where the loot was hidden and it is now in the possession of the state:* and the prosecution had at least one witness who would testify that Specs told the witness that the money was Brink's loot and revealed where it was concealed.* (Ex. B, p. 368.)

Under a headline, "HUB DOCTOR HID BRINKS CASH", and a subheadline "Bills Found in Bank in Philadelphia", there was a story that "part of the Brink's cash loot has been traced to a strong box in a Philadelphia bank rented six years ago by a doctor whose medical license has been revoked, was revealed here last night* .... The doctor, according to information gained by District Attorny Byrne, has been employed by the underworld since losing his license .... A considerable portion of O'Keefe's cut reached the doctor's hands according to information gained by District Attorney Byrne and FBI agents.* Four years ago he treated two members of the Brink's robbery gang who were badly beaten up by underworld characters equipped with brass knuckles during the

* There was no such evidence offered by the government or admitted at the trial.

kidnapping of Vincent Costa.* Approximately $15,000 of the Brink's cash was turned over to the doctor before Costa was released after the kidnapping.* John Carlson was the first to lead operators assigned to the Brink's robbery case to the Philadelphia vault.'"* (Ex. B, p. 360.)

Under the headlines, "BRINK BANDIT SINGS, BACKS O'KEEFE", "HINT GUSCIORA BREAKS BRINKS SILENCE", "SUSPECT'S STORY MAY BACK SPECS","POLICE BRINGING REPORT FROM PITTSBURGH PRISON", there appeared a number of stories to the effect that "District Attorney Byrne was awaiting a call from Pennsylvania (where Gusciora was in prison) that would tell him if a second robbery suspect had joined his pal O'Keefe in singing."* (Ex. B, pp. 375, 376, 377, 378, 379.)

Under a headline, "GUSCIORA TO JOIN SPECS IN SONGFEST", there was a story that "Brink's investigators were Boston bound from Pittsburgh today confident they have a principal government witness to corroborate the confession of Specs. 'Mission accomplished' was the terse report made by Captain Wilson to District Attorney Byrne after three days of conferences with Gusciora. During the final conversation, telephone communication was established with the office of District Attorney Byrne with O'Keefe present. It is known that Specs talked on the phone and it is believed that he convinced his one-time cell mate and chum that they had both been double-crossed. In addition to his mission accomplished statement, Wilson told Byrne that Gusciora 'has made statements' but that the prosecution right now is admitting nothing, only saying that the Pittsburgh prisoner was 'extremely cooperative' ".* (Ex. B, p. 379.)

Life Magazine featured a four page spread. Two of the

* There was no such evidence offered by the government or admitted at the trial.

pages were devoted to pictures of the gang under a heading, "THE ELEVEN MEN WHO STOLE A MILLION". The story was to the effect that "on the basis of O'Keefe's confession, it is possible to tell how the great Brink's robbery was very nearly the perfect crime . . . . Sometime in 1948 McGinnis, a liquor dealer with a long "sheet" for robbery and narcotics,* began talking with Tony Pino about the possibility of robbing Brinks. Presently from among those whose bad records* made them good prospects, they began recruiting a sizeable corps such a job would require, including dapper Vincent Costa, a good wheel man." (Ex. B, pp. 239, 240.)

Time Magazine featured two stories, one captioned "GANG LEADERS" and exhibiting a picture of Pino, stated, "Late one night last week a sly balding man wearing a sharp gabardine suit in the air of an English butler emerged from the jailers office . . . . He was Joseph James (Specs) O'Keefe, 47, and he had been talking almost continuously for three days. *Outside on the streets of Boston, and all over the United States, newspapers repeated Specs' story in huge headlines and minute details . . . .*" (Italics supplied.) (Ex. B, p. 243.)

The second Time Magazine story reported under the caption, "CRIME, THE BIG PAY-OFF, WHY O'KEEFE TOLD HIS STORY", stated that "O'Keefe's story was no surprise to the FBI and police. For five years they have been frustratingly familiar with many of the details of the crime and all but one of the eleven gang members (Faherty) have been primary suspects . . . . Said one investigator last week, 'We had all the pieces to the puzzle for a long time and knew pretty well how they went together, but we didn't have anything to make them stay until O'Keefe talked.' " (Ex. B, p. 243.)

---

* There was no such evidence offered by the government or admitted at the trial.

Under a front page headline, "FIND GIRL WHO CARRIED BRINK CASH TO KILLER", a sub-headline on the front page, "Pay Off Money for Trigger Burke," and a page 3 headline, "QUEEN OF DOCKS PAID OFF TRIGGER", there appeared a story that "Elmer 'Trigger' Burke was maintained on stolen money from the $1,219,000 Brink's robbery taken to him by a blonde woman friend well known on the New York waterfront,* *according to information received by District Attorney Garrett H. Byrne's office yesterday.* After 'Trigger' was spirited out of the Charles Street jail in one of the nation's most sensational prison deliveries, the blonde woman carried money to him that was supplied by the Brink's gang* . . . According to the district attorney's information, the gang who brought 'Trigger' here to wipe out Joseph J. 'Specs' O'Keefe, promised Burke that if he got into jail, they would get him out and when they had accomplished that, they would support him in style.* Authorities declare that the gang did just that and did it on the Brink's loot.* The blonde, a close friend of 'Trigger's' is the same woman who visited District Attorney Byrne two weeks ago. She is a constant visitor to 'Trigger' in the death house at Sing Sing where he awaits execution and is an intermediary in his efforts to make a deal with Massachusetts authorities whereby he will spill all he knows on the Brink's robbery on the guarantee that his death sentence will be commuted to life imprisonment.'" (Ex. C, pp. 393, 394, 395.)

Under a front page headline, "BRINK'S PROBERS SET TO ARREST HUB LAWYER AND WOMAN TODAY", there appeared a story that "first assistant district attorney Edward M. Sullivan said that 'a Boston attorney and a greater Boston woman will be taken into custody charged with suspicion of being accessories before the fact

* There was no such evidence offered by the government or admitted at the trial.

of the huge hold-up. Detectives attached to the staff of District Attorney Byrne will take the pair into custody tomorrow morning and bring them to Mr. Byrne's office. We plan to question the pair at length in connection with the Brink's robbery and we intend to book both on charges of being accessories before the fact of the robbery.'[6] . . . Mr. Sullivan also disclosed the fact that 'we have in our possession several admissions from Stanley A. Gusciora which we obtained from him in connection with the Brink's robbery'[*] . . . Four lawyers—two from Massachusetts and two from Pennsylvania—have been under suspicion in connection with the Brink's robbery for the past six years, officials admitted last night. In addition, at least five women close to or employed by members of the Brink's gang have been under close surveillance in connection with the robbery, Asst. District Attorney Sullivan disclosed. Still at large among the ten alleged bandits . . . are James Faherty . . . and Thomas F. Richardson. . . . Both, it is also understood, have been seeking to make 'a deal' in connection with the charges against them. The nature of the proposed 'deal' isn't known.[*] Neither Faherty nor Richardson is one of those whose arrest were ordered last night by District Attorney Byrne, Assistant District Attorney Sullivan said . . ." (Ex. C, pp. 403, 404, 405.)

Under a front page headline, "WOMAN'S PART IN BRINK'S JOB MAY BE TOLD", and an inside headline, "Brink Probers Quiz Man, Seek Woman", there appeared a story that "District Attorney Garrett H. Byrne announced today that his agents have picked up a man for questioning in the $1,218,211 Brink's robbery and that the arrest of a woman accomplice is imminent. . . . 'The man

---

[6] At no time has any lawyer or woman been charged with any offense linked to the Brink's robbery.

[*] There was no such evidence offered by the government or admitted at the trial.

is being held for questioning', Byrne said. 'I cannot reveal his identity at this time. The woman we are looking for is married . . . Gusciora, though safely on ice in Pennsylvania, is assuming more importance to Byrne's office with every passing day. He has joined O'Keefe in spilling whatever he knows about the robbery* and is expected to be a prosecution witness when the case comes to trial. Sullivan left virtually no doubt that Gusciora had talked.'" (Ex. C, pp. 406, 407, 408.)

Under a front-page headline, "SECOND BRINK BANDIT TALKS", a sub-headline, "Gusciora To Corroborate O'Keefe", and an inside page headline, "Second Brink Bandit Tells Full Story", there was a story that a second Brink bandit has talked and has made admissions which confirmed the confession of Joseph J. 'Specs' O'Keefe,* it was learned last night. . . . Confirmation of this disclosure came in the form of an announcement by Assistant District Attorney Edward M. Sullivan that Gusciora will definitely be called as a government witness when the Brink's case goes to trial. Sullivan, who is handling the prosecution, made the statement following an announcement by District Attorney Garrett H. Byrne that two more persons, a man and a woman, are to be arrested on charges of being accessories before the fact of the fabulous robbery. (Ex. C, pp. 409 410, 411.)

Under a headline, "MYSTERY BRINK'S WITNESS BACKS UP O'KEEFE STORY", it was reported that "Suffolk County prosecuting authorities took a long step forward in their pre-trial probe of the Brink's robbery yesterday when they came up with a mysterious witness they described as 'vitally important' in the case. . . . 'This confrontation was completely corroborative of O'Keefe's story', said Assistant District Attorney Edward M. Sulli-

* There was no such evidence offered by the government or admitted at the trial.

van who will prosecute at least six and possibly nine defendants on a multiplicity of indictments in connection with the great cash robbery of January 17, 1950. 'I cannot say any more than that', added the prosecutor. . . ."

Under a front page headline "NEW BRINK TRIO AIDS STATE", and an inside page headline, "MYSTERY TRIO BACKS O'KEEFE BRINK'S FACTS", appeared a story that three "mystery witnesses, two men and the wife of one of them, have corroborated vital parts of the confession of Joseph J. 'Specs' O'Keefe in connection with the Brink's robbery, and the prosecution now believes it has an iron clad case for presentation to a jury. . . . So important was the testimony of these witnesses considered, their identities will not be revealed until the trial and they are being kept under a twenty-four hour guard for their own safety, it was revealed. The two men and the woman did not take part in the actual million dollar robbery, it was learned, but were involved in the set up and were able to testify of their own knowledge.* (Ex. C, pp. 414, 415.)

Under a headline "GANGLAND'S HOTTEST TARGET, the New York Mirror featured a story to the effect that "three men already lie dead along the trail of golden blond" Bobby Greenlease who was kidnapped in Kansas City and questioned whether that death toll would be surpassed by "the five murders and a suicide attributed by Boston's district attorney to the recently solved Brink's case".* (Ex. C, p. 418.)

Under a front page headline, "BRINK CASE KILLERS PROWL HUB", a front page sub-headline, "Specs O'Keefe Under 24 Hour Machine Gun Prison Guard; 4 In Plot To Slay Informer", and a second page headline, "Gang Plot To Kill O'Keefe Foiled", there was a story that Specs O'Keefe, star government witness in the Brink's

* There was no such evidence offered by the government or admitted at the trial.

case "has been placed under a 24 hour special machine gun guard as result of the invasion of Boston by four known New York killers. . . . The out of town gunmen came here with the intention of silencing O'Keefe, authorities believe.* The authorities are also sure the gunmen were to intimidate other witnesses who have corroborated important parts of O'Kefe's confession.* As a result, a heavy machine gun guard was thrown around East Cambridge jail where O'Keefe is confined. . . . The other witnesses were placed under guard. . . . Because of the alterness of the local officials and the FBI, the plot was foiled and the hoodlums left. A minor objective, which also failed, was to collect contributions for the defense of Brinks defendants from the local underworld, it was reported.* Early last week the offices of District Attorney Garrett H. Byrne and the FBI were alerted by New York officials to the fact that four waterfront gunmen were en route to Boston. The identities of three of the hoodlums were furnished and local officials were warned to be on the lookout in the belief they meant serious business. It was learned that a conference was immediately held between Byrne, Edward Powers, FBI Agent in Charge, Asst. District Attorney Edward M. Sullivan, handling the Brink's case, and Captain Francis G. Wilson of the Homicide Squad who heads the District Attorney's investigators. Following the conference it was learned that FBI agents and detectives working out of Byrne's office picked up the trail in town of the New York gunmen. . . . The investigators, tailing the visitors day and night, learned that their mission was three-fold. First was to be silencing of O'Keefe by death so that the government would be deprived of its most important witness when the Brink's case goes to trial.* Second, it was learned, was the intimidation of witnesses who had been questioned at

* There was no such evidence offered by the government or admitted at the trial.

the District Attorney's office since January 12th and have given important information.* Third was the attempt to collect defense money from the underworld.* . . . So critical was the situation considered that five top FBI agents were flown here from Washington to help in guarding witnesses and taking preventive steps should the invaders decide to move in. Guarding of certain of the witnesses was considered extremely important as it was on their evidence that the grand jury returned 80 additional indictments against Anthony Pino. . . . Early Saturday the four gunmen flew back to New York but the special guards and the alert are still being maintained in the event that they return . . .'" (Ex. C, pp. 429-432.)

Under a caption, "EDITOR'S NOTEBOOK", it was stated in part "Lately you have seen the Brinks bandits yelling their heads off protesting they can't get a fair trial around here because the papers printed the stories of their arrests. The same cry was raised in the Maitland frauds and in the Trigger Burke escape. The news editor never has been able to figure this out. If J. Edgar Hoover announces some arrests and says in so many words that the Brinks case has been solved, what on earth are the newspapers supposed to do . . .? 'He'd never have been convicted if it wasn't for the publicity', say friends of a man who finds himself in a jam. Don't worry too much. It wasn't the Herald that got him into trouble." (Ex. C, p. 437.)

Under a headline, "KILLERS, ROBBERS, FUGITIVES—FBI'S 'MOST WANTED' ", there was a story to the effect that "as far as Boston is concerned 'Jimma' Faherty is tops on the list. . . . According to the FBI, Faherty helped plan the $1,219,000 robbery—high point in a criminal career that began when he was 22. Now 44,

* There was no such evidence offered by the government or admitted at the trial.

he has long been a partner in crime with Thomas F. 'Sandy' Richardson, Weymouth, the other Brink's fugitive. . . ." (Ex. C, p. 438.)

Under a headline, "BRINK' TRIAL TO PIT PROSECUTOR, DEFENDANT FOR SECOND TIME", there was a story that "history has a way of repeating itself and Suffolk Superior Court will see a second chapter written, involving a prosecutor and defendant who first fought a legal dual almost 13 years ago, when the so-called Brink's defendants are set to trial probably in June"; that McGinnis had been tried on January 31, 1943, for receiving stolen goods;* and that "now almost 13 years later, prosecutor Sullivan once again will be using a self-confessed bandit." (Ex. C, p. 441.)

Under a headline, "NEW BRINKS CASE FIGURE UNDER HOSPITAL GUARD HERE", there was a story that "a new figure in the Brink's robbery investigation, one who purportedly held part of the $1,219,000 loot for a time is under a police guard at the City Hospital, it was learned last night.* A 56 year old former Malden trucking contractor, also described as a close friend of the late Joseph Sylvester Banfield of Charlestown, one of the eleven named by the FBI as the Brinks bandits. . . . It was reported that Capt. Francis G. Wilson and Dectective John Howland of District Attorney Garrett H. Byrne's office, as well as FBI agents had been seeking the Malden man. . . . Banfield, a truck driver, who once worked for the man in the hospital, was alleged to have given the latter a substantial part of his $110,000 share of the armored car company loot for safekeeping."* (Ex. C, p. 442.)

Under the headline, "$111,000 Brink Case Pay Off Is Revealed" appeared the story that "questioned at his bedside at City Hospital by Boston police and FBI agents, a

* There was no such evidence offered by the government or admitted at the trial.

long sought figure in the fabulous Brink hold-up started to 'talk' yesterday and revealed how he saw the 'brains' of the Brink gang pay off $111,000 to one of the participants.* Identity of the arrested man captured in Malden on Sunday was kept a closely guarded secret by both District Attorney Garrett H. Byrne and FBI agents because they feared retaliation. This was the reason for the heavy police guard at the hospital. . . . Banfield and the man in protective custody were friends for years and police learned for the first time yesterday that he was present when Banfield received his share of the loot.* He returned to Banfield's Charlestown home and helped Banfield count the money. Once the counting of the money was completed, Banfield gave his friend $5,000.00.* . . . It was learned that Banfield and his friend inserted $20,000 in a piece of scrap pipe, sealed both ends and then tied a wire to the pipe. The money remained there until Banfield was stricken with a heart attack and died. Apparently others in the Brink's set up knew of the hiding place because soon after Banfield died, a friend of one of the key men in the gang arrived at Banfield's home. . . . In the presence of Banfiled's family the man muttered, 'he took the dough'.* Police know the identity of this man and are looking for him in all his familiar haunts. They had detectives checking last night because if he 'talked' he could tie another loose end in the investigation. . . . Capt. Wilson confirmed late last night that he had talked with a man at City Hospital and that 'close to the belly' information had been received." (Ex. C, p. 443.)

Under a caption, "FBI 'RAPS' CODDLING OF CONS" and a Washington by-line, J. Edgar Hoover was quoted as having delivered "sharp blasts at judges who coddle hardened criminals and authorities who run 'country club

* There was no such evidence offered by the government or admitted at the trial.

prisons. . . . The FBI Chief said no one is helped by 'fuzzy and shallow thinking which contributes to maudlin sentimentality'. As a sample of his feelings on 'ill advised parole and probation' Hoover noted that members of the 11 man gang alleged to have carried out the Boston Brink's robbery received twenty paroles and seventeen probations, plus one deportation pardon.* He gave numerous other examples of other 'fiendish' crimes traced to persons on probation and parole, and declared, 'Society suffers when any unit of the vast machinery of criminal justice places the interests of the wrong doer above the protection of society.' " (Ex. C, pp. 444, 446.)

Under the headline, "SECOND BRINKS FUGITIVE AMONG 'MOST WANTED' ", there was a story to the effect that "in 1936 Richardson served a prison sentence for armed robbery at Somerville. He was paroled in 1941* . . . . "Richardson had a curious alibi when questioned about the Brink's robbery. He told FBI agents 'I don't know whether I was home, working or drunk at the time of the robbery' . . . He is described by police as a heavy drinker. They believe one of his activities at the time of the robbery was operating big dice games in Boston."* (Ex. C, p. 447.)

Under the headline, "2 GIRLS' STORIES CRACK ALIBI OF BRINK'S SUSPECT" and two subheadlines, "Gusciora's Time Story Held False" and "Brink's Case Alibi Cracked", there was a story that "the FBI and investigators for District Attorney Garrett H. Byrne last night cracked the alibi of Stanley A. Gusciora. . . . Meanwhile District Attorney Byrne's investigators here said a second girl had hurled the lie at Gusciora* . . . . A top investigator last night said that it 'now is clear that establishment of alibis for that night was just as important

* There was no such evidence offered by the government or admitted at the trial.

a part of the whole enterprise as actually taking the money. The gang made it a point to be seen in bars, taverns and restaurants a short time before they descended on Brinks and to get back to public places as quickly as possible afterwards. There is reason to believe that several of them put themselves in the paths of police that night to be picked up as Brink's suspects. Now they can say they were in police stations that night with the elements of time, six years later, to be in dispute. (Ex. C, p. 511.)

Under the headline, "BYRNE KEEPS OPEN GUSCIORA SONG ROLE", the story appeared, "Rebuffed in his plans to pick up a second 'song bird,' District Attorney Garrett H. Byrne hurried his plans for a June trial of the Brink's robbery defendants, but with a faint and lingering hope that Stanley Gusciora . . . still may be cast in the role of a corroborating government witness." (Ex. C, p. 513.)

Indicative of the newspaper space accorded the Brink's case was a letter to the editor inquiring, "Isn't it about time you printed other news than the Brink's case . . .? It is getting to be as nauseous as the coverage of the Prince Ranier Wedding to what's her name." (Ex. C, p. 520.)

Under headlines announcing the arrest of Faherty and Richardson, the FBI press release as to how the crime was committed was repeated. Asst. District Attorney Edward Sullivan was quoted as saying, "It probably will be some time today before it can be established whether the money seized last night was part of the Brink's loot." (Ex. C, pp. 506, 630, 531, 534, 539, 557.)

Under various headlines, "SOURCE OF COINS BRINKS BANK", "COINS MAY BE BRINKS", "BOTH COINS, GUNS MAY BE BRINK LOOT", "SEEK TO LINK COINS WITH LOOT FROM BRINKS", "COINS HELD BRINK TIE"; stories appeared linking the $5,000 worth

of coins seized at the time of the arrest of Richardson and Faherty with the Brink's loot.* (Ex. C, pp. 562, 571, 574, 577.)

B. Between May 29, 1956 and August 6, 1956, when the trial began

Under a front page caption, "TWELVE CLAIM $100,000 REWARD, MUST AWAIT BRINKS TRIAL", there was a story that a special committee had been set up to consider claims for the reward which had been offered by Brinks. "Thus far no claimant has asked anonymity for fear of gangland reprisal as happened to Arnold Shuster of Brooklyn after he led police to nab Willy 'the Actor' Sutton . . . . Meanwhile, if you can't qualify for the Brinks reward money, take comfort in the knowledge that several millions of dollars of reward money always awaits informants about unsolved robberies, murders, smuggling and income tax evasion." (Ex. D, p. 589.)

Under a front page headline "FIND BRINKS CASH HORDE IN BALTIMORE", there was a story that one Jordan Perry had been arrested in Baltimore and found in possession of $4635.00" of the $1,219,000 cash stolen in the fabulous Brinks robbery."* (Ex. D, pp. 591, 592, 593, 596, 597.)

Under a front page headline, $90,000 BRINKS LOOT FOUND HERE", "$90,000 BRINKS LOOT FOUND IN WALL OF SOUTH END OFFICE", there was a story "that approximately $90,000 of the Brinks $1,219,000 loot was recovered late yesterday afternoon by agents of the FBI and District Attorney Byrne . . . . At 8:30 o'clock last night the FBI and District Attorney Byrne positively identified the money as part of the $98,900 of Brinks stolen currency whose serial numbers had been broadcast through-

* There was no such evidence offered by the government or admitted at the trial.

out the world . . . . A brief joint statement was issued shortly before 10:00 p.m. last night by District Attorney Byrne and Special Agent Edward J. Hadgett of the FBI, 'The FBI and police attached to District Attorney Byrne's office today uncovered a cache of money linked to the Brinks cash which has been identified and is now being repossessed. $4635.00 recovered by the Baltimore police department upon the arrest of Jordan Perry in Baltimore out of $4,822.57 has also been identified as a portion of the Brinks loot.'* The stories went on to repeat the murder of John Carlson, "believed to have been slain after disclosures he made relative to the Brinks robbery to District Attorney Byrne and Assistant District Attorney Sullivan .... was believed to have been taken for a ride and slain and buried on a lonely beach on the coastline north of Boston.* Carlson and Perry, according to statements the latter made in Baltimore, knew Elmer "Trigger" Burke, alleged professional New York gunman who attempted to machine gun O'Keefe to death in Victory Road, Dorchester, on June 16, 1954."* (Ex. D, pp. 606, 607, 608, 609, 610, 611, 640.)

Under a headline, "FIND FINGERPRINTS ON BRINKS CASH BOX", there was a story, accompanied by photographs of District Attorney Byrne and Assistant District Attorney Sullivan viewing the cash box found in the wall of a south end office, that "fingerprints which could prove to be the clinching telltale evidence long sought by the police and FBI in the six year old Brinks robbery were found by authorities today* . . . . Information about the fingerprints was guarded closely by investigators. They indicated they considered the prints equally important as evidence as was yesterday's recovery of $86,000 in stolen Brinks cash." (Ex. D, p. 654.)

* There was no such evidence offered by the government or admitted at the trial.

Stories appeared to the effect that Perry, one Bucelli and one Bennett were to be charged "with being accessories after the fact to the Brink's robbery." (Ex. D, p. 660.)

Under a front page headline, "SPECS O'KEEFE WAS TOLD 'HOT CASH BURNT'", BRINKS DOUBLE CROSS THE KEY TO LOOT ROUND UP", there was a story to the effect that the sensational new break, the finding of the $90,000, in the fabulous Brink's robbery, "was the result of the sly double crossing of Joseph J. 'Specs' O'Keefe. O'Keefe is the much shot at Boston criminal who has given authorities the purported inside stories of the fabulous 1950 record breaking holdup. It was the second double cross handed O'Keefe, destined to be star witness . . . the first came when O'Keefe was swindled out of his promised share of 'safe' Brinks cash . . . The second concerned $90,986.00 with known serial numbers. O'Keefe had been told this was burned. Recovery of $4635.00 in Baltimore yesterday* and close to $90,000 later in a secret cache in the Boston South End revealed the extent of the O'Keefe double cross . . . Investigators concluded today that certain members of the gang must have been desperate for ready cash and started passing the red hot serial numbered Brinks bills." (Ex. D, p. 663.)

Under the headline "THUMBNAIL SKETCH OF BRINKS CASE", a comprehensive chronology of the famed Brinks holdup was listed commencing with the date January 17, 1950:

> "May 14, 1952—Alfred Gagnon of Pawtucket, in Rhode Island State Prison, names Carleton M. O'Brien of West Warwick, Rhode Island, as principal in Brink's hold-up.*

---

* There was no such evidence offered by the government or admitted at the trial.

"May 17, 1952—O'Brien slain by shotgun blast outside of his West Warwick home.*

"May 19, 1952—Convict Gagnon changes his story when questioned by Mass. authorities.*

"June 16, 1954—O'Keefe is machine gunned in Dorchester by Elmer Trigger Burke . . . *

"July 15, 1954—John H. Carlson, South End Bookie, disappears . . . after conferring with District Attorney Garrett H. Byrne. He has not been found and is believed to be a victim of a gangland slaying . . . *

"Feb. 20, 1955—O'Keefe indicates he will spill Brink's story but after questioning by Attorney General's office asks for more time to think it over . . .

"Dec. 2, 1955—Elmer Trigger Burke convicted of slaying barroom buddy in New York.*

"Jan. 11, 1956—Execution of Burke delayed by appeal. Some indicate he might have done some 'singing' on Brink's job to save own neck.*

"Jan. 12, 1956—FBI announces they have cracked Brink's case. Six suspects picked up.

"Jan. 13, 1956—Suffolk Grand Jury returns indictments against eleven alleged participants in robbery.

"June 4, 1956—Judge Felix Forte overruled 1200-plus motions."[7] (Ex. D, p. 663.)

Under a headline, "MALIBOU BEACH NAMED BRINKS HIDING PLACE", it was reported that FBI agents and police investigators found a new undercover source—a source now 'feeding' the investigators new inside information . . . . The source has named the man who

[7] Actually appellants first filed to each of the 158 indictments seven documents: a motion to quash, a plea in bar, a plea in abatement, three claims for jury trial (one for each of the special pleadings) and a motion for particulars.

* There was no such evidence offered by the government or admitted at the trial.

buried the cash as the central figure in the case.'"* (Ex. D, p. 672.)

Under a headline, "DOES YARMOUTH BEACH HIDE CARLSON'S BONES?" there was a story that Carlson, according to one version was strangled by a professional killer and buried in the beach at Yarmouth, Cape Cod.* He vanished August 2, 1954, the day he conferred with District Attorney Byrne about the robbery.* Carlson supposedly was rubbed out because he was a friend of Joseph "Specs" O'Keefe and knew too much about the robbery.* . . . . Yarmouth, however, may yet fit as one of the pieces in the massive Brinks puzzle, . . . (Ex. D, p. 673.)

Under a front page headline, "4 MEN LINKED TO BRINK'S CASE SPLIT UP AT SOUTH SHORE HOUSE", and the sub-headline, "Perry Tells Police $5,000 Given Him Friday To Pass", there was a story to the effect that "disclosure that $30,000 of Brink's payroll recorded loot was delivered to a South Shore home Friday for circulation throughout the country* was made last night shortly after District Attorney Garrett H. Byrne obtained 22 indictments containing 66 counts against three greater Boston men charging them with being accessories after the fact to the Brink's $1,219,000 robbery"; that Perry had stated that he had been in a South Shore home wih 4 men whom he allegedly named; and that he had been told that he would receive one-sixth of $100,000 to spread the money.* (Ex. D, p. 684.)

Under the headline, "PERRY MAY SAY WHO GAVE CASH", there was a report that "investigators said that Perry will return voluntarily from Baltimore within the next twenty-four hours and tell his story.* Perry's return to Boston ties in with an assertion yesterday by District Attorney Garrett H. Byrne that he intended to present

* There was no such evidence offered by the government or admitted at the trial.

'important other evidence' to the Suffolk Grand Jury." (Ex. D, p. 671.)

Under the headline, "TIGHTEN BRINK'S CASE JAIL GUARD", it was reported that "drastic security measures were put into effect today at Charles Street jail to safeguard 4 Brink's case prisoners held there. Two of them, Michael Vincent Geagan, 47 of Malden and Vincent James Costa. . . . The others are John F. Bucelli . . . and Edward Bennett." (Ex D, p. 687.)

Under the front page headline, "CARLSON'S KILLER IS NAMED", and the sub-headline, "Identified By Man Held As Brink's Loot Pusher", there was a story that the identity and whereabouts of Carlson's slayer had been obtained through Jordan Perry who had been arrested in Baltimore with $4,635 of serial recorded Brink's loot,* that the "four men Perry named after his arrest were all former associates of O'Keefe and Carlson"; and that two of the four men were the alleged slayers.* (Ex. D, p. 696.)

Other headlines read "BRINK'S LINK TO SLAYING BARED", "PERRY NAMES CARLSON SLAYER", "NAMES KILLERS OF CARLSON IN BRINK EXPOSE".* (Ex. D, pp. 699, 702, 710.)

Under a front page headline, "BRINK'S WITNESS OFFERS TO TELL WHERE $1,219,000 LOOT HELD", there was a story that an "offer to bare all details in connection with the handling of the Brink's $1,219,000 loot was made yesterday to District Attorney Garrett H. Byrne by a key winess.* . . . The offer by the key witness was being considered and discussed last night by Assistant District Attorney Edward M. Sullivan with authorized representatives of the witness. The witness is described as an apparently well to do greater Boston resident as well

* There was no such evidence offered by the government or admitted at the trial.

as a director of a loan agency that specializes in loans to racketeers." (Ex. D, p. 712.)

Under a headline, "BRINK'S FIGURE OFFERS FACTS ON LOOT," there was a story that "investigators for District Attorney Garrett H. Byrne disclosed that a key figure in the six year old mystery who is not one of the accused defendants had made 'overtures' to disclose the source of the $90,000 in loot recovered this week."* (Ex. D, pp. 715-716.)

Under a front page headline, "BRINK'S WITNESS IS MURDERED, SHOT IN HEAD TWICE IN HIS CAR", there was a story that "the slain Brink's witness . . . (William Cameron) had been furnishing District Attorney Byrne, Assistant District Attorney Sullivan, Capt. Frank G. Wilson, attached to Byrne's staff, and FBI agents with information relevant to the Brink's robbery."* The story revived the disappearance of John Carlson stating that "Carlson disappeared August 2, 1954, after he was lured from his South End home shortly after giving District Attorney Byrne information on the Brink's case."* (Ex. D, p. 727.)

Similar stories concerning the murder of William Cameron who supposedly had furnished the government with evidence concerning the Brink's case were published under flamboyant headlines such as "BRINK'S CASE FIGURE FOUND SHOT TO DEATH", "BRINK'S CASE FIGURE SLAIN IN GANGLAND STYLE", "HUNT BOOKIE IN BRINK SLAYING", "BRINK CASE FIGURE SHOT DEAD", "BRINK'S CASE MURDER".* (Ex. D, pp. 730, 731, 736, 740, 743.)

Under the headline, "BRINK'S CASE MURDER", the story went on to report that "one official probing the murder, declared flatly 'he was killed because he knew too

---

* There was no such evidence offered by the government or admitted at the trial.

much."* The officials believe his death resulted from suspicion attached to him as the result of an important development in the investigation of the fabulous case. The spokesman said the victim had been questioned by the Boston police about certain aspects of the case but he had never been subjected to an FBI grilling . . . . Police said that Cameron (the murdered man) was friendly with at least two men long suspected in the Brink's hold-up."* (Ex. D, p. 743.)

Under the headline, "COUPLE PARTIALLY IDENTIFY TWO BRINK'S WITNESS KILLERS", there was a story that "partial identification of two of the slayers of Brink's witness William Cameron, 49, of 359 Geneva Avenue, Dorchester, was furnished police officials last night by a Boston woman and a South Boston navy man . . . . Both witnesses asked for police protection before telling their stories, and police protection was ordered by District Attorney Byrne".* (Ex. D, p. 744.)

Under a headline caption "CARLSON BODY DELIVERY SEEN—SAILOR, WOMAN HEAD BRINK'S CASE PROBE", there was a story that "police last night disclosed they had eye witnesses to the delivery of the body of the slain William Cameron, purported Brink's robbery informer.* . . . Detectives possessed information that the trio comprised hired killers from out of town engaged by local gangsters who 'spotted' Carlson for them.* This was the pattern in the almost fatal machine gunning of Joseph J. (Specs) O'Keefe, who since has told all about Brinks and unquestionably in the case of John Henry Carlson . . . It was clear last night that organized crime was putting the pressure on authorities."* (Ex. D, p. 745.)

Under the headline, "GUARD GIRL WITNESS TO RIDE SLAYER", it was stated that "officials were re-

* There was no such evidence offered by the government or admitted at the trial.

ported to have declared that Cameron gave them no information of value on the Brink's case but that he was with several persons who have figured in the investigation since the $1,219,000 stick up was staged six years ago.'" (Ex. D, p. 750.)

Under the headline, "BRINK KILLING CLUE FIZZLES", it was reported that "investigators were certain Cameron was 'rubbed out' for tipping the FBI to the Coleman Street, Dorchester, apartment where Faherty and Richardson (two of the appellants) were captured May 16th. One of the two slaying suspects has been identified as a South Shore resident already somewhat involved in the Brink's case.* The other is a south Boston man with a sizeable record of conflict with the law." (Ex. D, p. 750.)

Under the front page headline, "BRINK'S KILLER KNOWN", there was a story that the "killer of William J. Cameron of Dorchester, one time Brink's robbery suspect, now is known, police disclosed today. . . . Police are convinced the murder is an aftermath of the Brink's robbery.* Today police were in possession of a new version of Cameron's role in the capture of two Brink case suspects —Thomas F. Richardson and James I. Faherty. Detectives said Cameron, who had a hand in helping the two get a hideout, tipped off the FBI how to find the place.* . . . 'That was the tip that led to their capture May 16', police said. 'This tip became the motive for Cameron's murder,' they said.* . . . Police and arson squad investigators were checking an unexplained fire which destroyed a $6,000 automobile last night in a Roxbury field near railroad yards. They sought a possible connection with the Brink's case." (Ex. D, p. 753.)

Under the headline, "6 STATE ALERT FOR 3 IN BRINK'S CASE MURDER", it was reported that "a six

* There was no such evidence offered by the government or admitted at the trial.

state alarm was sent out yesterday for the arrest of three men identified as new suspects in the gangland slaying of William Cameron . . . whom authorities say was murdered because he revealed information about the Brink's robbery.* . . . One of the three men in custody has a reputation as a waterfront strong man. Another is a Quincy resident who recently became involved in the Brink's investigation. . . . It was learned that Cameron was not the man who tipped off the FBI to the hideout being used by two recently arrested Brink's suspects. He was, however, actively associated with the intimates of several persons who have played a prominent part in the Brink's case." (Ex. D, p. 755.)

Under the front page headline, "FIND WOMAN WITNESS IN BRINK MURDER", it was stated that "authorities who are keeping the woman witness' identity a strict secret, say Cameron was murdered because he revealed information about the Brink's robbery."* (Ex. D, p. 756.)

Under the headline, "BRINK'S SLAYING PROBERS RELEASE DORCHESTER MAN", it was stated that "police last night released a 50 year old Dorchester longshoreman they had held since Sunday night for questioning in connection with the three day old slaying of William Cameron . . . reportedly a Brink's case informer."* (Ex. D, p. 760.)

Under the headline, "CAMERON KILLER'S TRAIL TURNS COLD", the story said that "Cameron was friendly with several others already mentioned in the Brink's probe, and detectives theorized he may have been killed in the belief that he passed on important information in the case to authorities."* (Ex. D, p. 760.)

Under the headline, "BRINK FIGURE SOUTH", it was reported that "a 25 year old greater Boston woman

* There was no such evidence offered by the government or admitted at the trial.

who may have vital information on the Brink's robbery has disappeared,* police disclosed today. . . . She was described as a blonde who had been in touch with Brink's case suspects from time to time." (Ex. D, p. 761.)

Under the headline, "BLONDE BRINK GO BETWEEN HAS VANISHED" and the sub-headline, "DISAPPEARED DAY LOOT WAS FOUND", there was a story that "a beautiful blonde girl who acted as a go between for key figures in the Brink's case was being sought by both the FBI and detectives attached to the office of District Attorney Garrett H. Byrne yesterday . . . . Investigators say she had been living in a Boston suburb but completely dropped from sight the night $70,000 in Brink money was found in a Tremont Street, South End office. Authorities declare they want the woman for questioning and say she carried messages from one Brink's figure to another when they didn't want to be seen meeting each other. She is known to be friendly with several of the suspects in the big robbery."* (Ex. D, p. 762.)

Under the headline, "FBI SWOOP FOR BRINK'S LOOT FAILS", there was a story that "a combined force of FBI agents and detectives from the office of District Attorney Garrett H. Byrne late yesterday staged another raid in search of Brink's robbery loot, but announced afterwards it was fruitless. Also, it was reported they were hunting evidence in the gangland slaying of William Cameron, accused of being a stool pigeon in the Brink's investigation.* (Ex. D, p. 765.)

Under the headline, "BRINK'S RAIDERS IN NEW SWOOP", there was a story that "because of the killing of Cameron who had given information to the authorities in the Brink's case, it was learned that all witnesses in the case are being guarded".* (Ex. D, p. 767.)

---

* There was no such evidence offered by the government or admitted at the trial.

COPY BOUND CLOSE IN CENTER

Under the headline, "PERRY MAY GIVE CLUE TO BRINK'S CASE", and then a sub-headline, "PERRY MAY PROVIDE KEY TO CARLSON'S MYSTERY, LOCATION OF BRINK'S CASE", the story reported that "police expect Jordan Perry . . . may provide answers to puzzling factors in the fabulous $1,219,000 robbery. Police seek the answers to the mysterious disappearance of John H. Carlson, a pal of Joseph 'Specs' O'Keefe, key figure in the Brink's case." (Ex. D, p. 776.)

Under the headline, "BYRNE FIGHTS RELEASE OF BUCELLI IN $100,000 BAIL", there was a story that "District Attorney Garrett H. Byrne yesterday linked a Rhode Island mob of gangsters to the Brink's $1,219,000 robbery and disposition of the hugh cash loot.* Information uncovered during the past several weeks by his special agents . . . show that at least four of the men indicted in the Brink's robbery were in contact with a go between with the leaders of a Rhode Island gang."* (Ex. D, p. 780.)

Under the headline, "BRINK LOOT CONFESSION", and the sub-headline, "PERRY CAPTURED IN BALTIMORE TELLS HIS STORY OF 'HOT MONEY' ", there appeared a story that Jordan Perry . . . made a full confession to District Attorney Garrett H. Bryne and FBI agents yesterday of his part in trying to dispose of a portion of the $1,219,000 Brink's loot. Perry was questioned all day in the District Attorney's office . . . Perry according to the District Attorney's staff, gave a full and detailed account of how he was given thousands of dollars worth of the 'hot' bills included in the Brink's loot and sent out to pass them.* . . . Perry, questioned not only by the District Attorney, but by Assistant District Attorney Edward M. Sullivan and Captain Wilson . . . was an extremely cooperative witness". (Ex. D, p. 796.)

---

* There was no such evidence offered by the government or admitted at the trial.

Under a front page headline, "BRINK'S SUSPECT GUSCIORA DIES IN CELL", and a sub-headline BRINK PRISON AIDES DOUBT SUICIDE OR VIOLENCE", Gusciora's death while in jail was reported. (Ex. D, pp. 803-804.)

Under the headline, "FOUL PLAY RULED OUT IN DEATH OF BRINK SUSPECT GUSCIORA", it was reported that Gusciora "died of a 'tumor of the brain'... State officials indicated last night that every phase of the one time hoodlum's death would be scrutinized for any possibility of foul play. But Massachusetts Corrections Commissioner Russell G. Oswald, after a preliminary investigation, said he was confident no violence was involved." (Ex. D. p. 806.)

Under the headline, "PROBE BRINK SUSPECTS JAIL DEATH", and the sub-headline "GUSCIORA MYSTERIOUS DEATH SPEARS PROBE", stories were carried not only about Gusciora's death but also implying that he had been murdered.* (Ex. D, p. 810) Under the headline, "PROBE GUSCIORA MYSTERIOUS DEATH IN PRISON", and the sub-headline, "SPECS EX PAL LATEST", there was a story that "a short time operator, George R. Killeen, South Boston number pool operator, was shot to death in a side walk ambush. He had also been questioned concerning the Brink's case.* Just after Elmer 'Trigger' Burke tried to rub out 'Specs' O'Keefe in Dorchester with machine gun fire,* John Henry Carlson, O'Keefe's pal disappeared.* Carlson had been helpful to police. Both officials and the underworld agree Carlson was taken for a ride and murdered.* The body was never found. Last month William Cameron . . . believed to have 'tipped off' the police where they could find the Brink's loot, was slain.* . . . Several years ago Carleton M. O'Brien,

* There was no such evidence offered by the governmnt or admitted at the trial.

Rhode Island club owner, was slain with a blast from a shot gun near his home.* He had been a suspect in the case. There was a persistent suspicion George O'Brien, Weymouth ex-convict, was a fringe figure in the Brink's robbery".* (Ex D, p. 812.)

Under the headline, "BURKE'S EXECUTION WILL NOT AFFECT BRINK'S TRIAL PLAN", there was a story to the effect that "District Attorney Garrett H. Byrne said last night that the execution of Elmer 'Trigger' Burke, a notorious hoodlum who staged a daring escape from the Charles Street Jail two years ago would have no effect on the Brink's trial date opening here August 6. . . . At the time of his arrest here investigators quoted Burke as boasting that he had been brought here to kill O'Keefe.* It was theorized that the motive had been to seal O'Keefe's lips forever.* (Ex. D, p. 817.)

Under the headline, "STRONG DOORS, NEW LOCKS IN BRINK'S COURT", there was a story that 'workman were busy yesterday transforming the seventh floor of the Suffolk County Courthouse into a maximum security area in preparation for the forthcoming Brink's trial. Locks were being changed on doors, double doors were being added to those already in place and massive new doors were being installed in both ends of the corridor outside the courtroom. . . . Separate benches also are being set up for the many security guards who will be on duty throughout the trial. The defendants will be brought from jail in vans and will be locked in cells on the half floor above. A big witness room in the rear of the courtroom is being transformed into a press room with teletype and telegraph machines and telephones being installed." (Ex. D, p. 822.)

Under the headline, "FANTASTIC HUNT ON FOR

* There was no such evidence offered by the government or admitted at the trial.

BRINK FIGURE", there was a story that "almost on the eve of the Brink trial it was discovered yesterday that a key government witness is missing and is being fearfully sought by the FBI.* Prior to the disclosure the fact that an important witness was missing was a closely guarded secret, so much so it was believed that the prosecution was fully prepared for the start of the trial August 6th. District Attorney Garrett H. Byrne, his aides and the FBI declined to identify the man being sought. The only information available was that he was 'out of the state' and 'we hope to find him in time for the trial' " (Ex. D, p. 828.)

Under a headline, "BRINKS DEFENDANTS INSIST THEY CAN'T GET FAIR TRIAL", there was a story purporting to set forth the position of the appellants. Included in the story was the FBI news release of January 12, 1956, setting forth that "the Department of Justice announced that intensive investigation by the FBI for the past six years has resulted in the solution of the million dollar Brink's robbery." (Ex. D, p. 829.)

Under the headline, "BRINK FIGURE FEARED SLAIN", there appeared a story that "a mysteriously missing star witness in the Brink's case was believed by officials yesterday to have been killed to prevent his testifying at the trial which begins August 6th.* FBI agents have been hunting the witness throughout the country and have found no trace of him. He was recently questioned by detectives attached to District Attorney Garrett H. Byrne's office. . . . He is declared to have some knowledge of the actual preparation of the big robbery and to have frequented a place in Charlestown where the stolen money was to be dropped if anything went wrong with the original plans."* (Ex. D, p. 829.)

---

* There was no such evidence offered by the government or admitted at the trial.

COPY BOUND CLOSE IN CENTER

In connection with the headline, "STAGE SET FOR BRINK'S TRIAL OPENING", there appeared pictures of the trial judge who was to sit on the case and a picture showing police officers and employees of Brinks standing in the vault room where the robbery took place. The story was to the effect that "the long awaited Brink's case trial will begin on the heavily guarded seventh floor of the courthouse. . . . The entire world will be watching as the FBI acting through the Suffolk County district attorney attempts to prove that it has solved the greatest robbery in American history. . . . Many shadowy underworld figures who may have been connected with the robbery are missing or murdered.* Nobody knows for sure what happened to men like the bookie John H. Carlson.* The apparent suicide of George O'Brien, the Danvers defendant, has never been satisfactory explained, nor has the recent murder of William Cameron of Dorchester."* (Ex. D, p. 830.)

There was a series of three syndicated articles. The first, under the headline, "CLAIM OF CENTURY—BRINK'S HOLD-UP DEPICTS BOSTON IN STRANGE LIGHT—Since Robbery, Austere Front of City Has Been Ripped Away", discussed the robbery and the method by which it was committed and stated in part, "with this, the gunmen left, pulling the money sacks. A half hour later, Boston was in a turmoil—and the Brink's robbers were back in Roxbury". (Ex. D, p. 840.)

The second story which appeared under the headline, "THE GREAT BRINK'S ROBBERY—CASE COULD MAKE D.A. SHOE-IN FOR GOVERNOR—Specs O'Keefe Key To Byrne's Future—", was to the effect that "in the carpeted sixth floor office of Garrett Byrne, . . . the District Attorney was talking about the biggest robbery in history. Gripping things make up the Brink's case . . .

* There was no such evidence offered by the government or admitted at the trial.

over a dozen murders* . . . a suicide* . . . money found in a dingy rooming house, but almost a million still unaccounted for . . . and a gangster talking. . . . 'Mr. O'Keefe is right in there now', he (District Attorney Byrne) said. 'He has been with us for some time now. He has a fantastic story to tell, if you care to be mild about things, but my main interest is what those twelve people in the jury have to say. They're the important ones now'. . . . The FBI, too, want this one badly. From J. Edgar Hoover in Washington down to the Boston Bureau. . . . 'We were the only agency to keep working on this case right through', Edward J. Powers, the FBI Boston head stresses. 'The Bureau wants that in the record'. Hoover took the case as a personal insult, many maintained, and he kept a day by day pressure on the suspects. . . . Authorities never have officially admitted that such evidence (wire tapping) had been gathered, but it is an open secret in Boston that they had recorded conversations of those now up for trial." (Ex. D, p. 841.)

The final story in the series was captioned "CRIME OF CENTURY—Brink's Suspects Gave 'No Show of Money' ", and was accompanied by pictures of appellants McGinnis, Pino and Maffie. The story set forth that "Anthony Pino is one of Boston's best known criminals.* . . . Despite a record of 62 arrests, he lived quietly in a fair to comfortable home in the Dorchester section. . . . Joe McGinnis is no new comer to law trouble.* . . . 'McGinnis', one who knows him says, is a millionaire'. . . . Police and FBI say he was the major planner. . . . 'These men had everything they wanted,' the FBI's Edward Powers countered. 'They weren't dumb enough to live flashy. Just day by day living was enough.' " (Ex. D, p. 841.)

---

* There was no such evidence offered by the government or admitted at the trial.

Under the headline, "HINT FAST HALT OF BRINK TRIAL", there was a story summarizing the charges against appellants and stating that O'Keefe is under constant guard at East Cambridge Jail. The eight defendants are all housed at Charles Street Jail where extraordinary precautions have been taken. Every day of the trial a prison van containing the eight defendants will be ringed by police cars and special police details will stop all traffic during the short trip from the jail to the courthouse. In the courthouse the entire seventh floor has been blocked off and admittance to it will be by special pass only." (Ex. D, p. 843.)

Under the headline, "EPIC BRINK TRIAL UNDER WAY TODAY", the story was carried that "The opening day of the trial will see the Pemberton Square Courthouse operating under one of the strictest security programs in the history of Massachusetts trials. Admission to the seventh floor will be by pass only." (Ex. E, p. 845.)

Appendix D

How Other States Provide a Defendant with the Opportunity to Prove Prejudice on the Part of Jurors

Forty States in Which by Statute, Rule or Judicial Decision a Defendant Has the Right to Examine Prospective Jurors [1]

1. Ala. Code tit. 30, sec. 52 (1940) provides that "either party shall have the right to examine jurors . . . ." In *Jackson* v. *McFadden*, 260 Ala. 109, 69 So. 2d 286, the right to examine prospective jurors was recognized, although counsel was held to have waived his right.

2. Alaska Compiled Laws, sec. 55-7-41 (1949) provides that in civil and criminal cases, "jurors shall be examined as to their qualifications first by the plaintiff and then by the defendant."

3. Ariz. Supreme Court Rule 217 reads: "Either party may question the jurors."

4. Ark. Stat. sec. 39-226 (1947) reads: "The court shall examine all prospective jurors under oath upon all matters set forth in the statutes as disqualifications. Further questions may be asked by the Court, or by the attorneys in the case, in the discretion of the Court." In spite of this statute, Arkansas courts recognize a lawyer's right to examine jurors. *In Missouri Pac. Transp. Co.* v. *Johnson*, 197 Ark. 1129, 126 S.W. 2d 931, the trial court offered to ask the jurors any questions that defendant's lawyer might suggest. Still, the appellate court reversed solely because the trial judge did not allow defendant's attorney to examine each juror directly. In *Sorrentino* v. *State*, 214 Ark. 115, 119, 214 S.W. 2d 517, 520, the court said: "Appellant had a right to inquire into the attitude of the prospective juror. . . ."

[1] Some civil cases are cited, but only where states do not distinguish between civil and criminal voir dire examinations.

COPY BOUND CLOSE IN CENTER

5. Cal. Penal Code sec. 1078 (Deering's 1959) requires that the "trial court . . . shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant." In *People* v. *Coen,* 205 Cal. 596, 605-606, 271 Pac. 1074, 1078, defendant's counsel sought to ask the prospective jurors whether they had read various newspaper articles about the case. The appellate court stated that "the trial court unduly restricted the examination" by disallowing the questions concerning newspaper publicity, but held that defendant's rights were lost by waiver.

6. *Zancannelli* v. *People,* 63 Colo. 252, 260, 165 Pac. 612, 614, holds that "the defendant had a right to propound questions to the proposed jurors . . . ."

7. Conn. Gen. Stat. sec. 51-240 (1958) provides that "either party may examine each juror . . . ."

8. Fla. Stat. sec. 54.13 (1959) provides that "the respective parties" shall "have the right to orally examine jurors upon their voir dire."

9. Ga. L. 1951, p. 216 and L. 1959, p. 1083 provide that "both the State and the defendant shall have the right to an individual examination of each juror . . . ."

10. Hawaii R.L. sec. 231-10 (1955) reads: "Either party shall have the right to examine a proposed juror . . . ."

11. In *State* v. *Hoagland,* 39 Idaho 405, 228 Pac. 314 the appellate court assumed counsel's right to ask relevant questions. *State* v. *Healey,* 45 Idaho 73, 260 Pac. 694, is another example of Idaho's custom of allowing counsel to examine jurors.

12. Ill. R.S. c. 110, sec. 101.24-1 (1959) reads: "The parties or their attorneys shall be allowed a reasonable opportunity to supplement (the judge's) examination . . . ." In *Donovan* v. *People,* 139 Ill. 412, 28 N.E. 964, the trial judge offered to ask the jurors questions if defense counsel would suggest them; the conviction was reversed because defense counsel was not given an opportunity to ask the questions directly. Similarly, in *People* v. *DeLordo,* 350

Ill. 148, 151-152, 182 N.E. 726, 728, the conviciton was reversed because defense counsel was not given an opportunity to examine the jurors; the trial court's error "deprived the defendants of a fair and impartial trial."

13. *Roby* v. *State,* 215 Ind. 55, 17 N.E. 2d 800, assumes that in accord with Indiana practice, there will be some examination by defendant's counsel, as does *Epps* v. *State,* 102 Ind. 539, 1 N.E. 491. There is a "right in examining prospective jurors to ask any question pertinent to the issue (which tends) to elicit information upon which to base a challenge, either peremptory or for cause." *Baker* v. *State,* 190 Ind. 385, 395, 129 N.E. 468, 472.

14. In Iowa counsel have an opportunity for "cross-examination" of prospective jurors. *State* v. *Rhodes,* 227 Ia. 332, 335, 288 N.W. 98, 100, *cert. denied,* 310 U.S. 626, 60 S. Ct. 980. Other examples of the Iowa custom permitting counsel to examine prospective jurors directly are *State* v. *Harrington,* 220 Ia. 1116, 264 N.W. 24, and *State* v. *Wheelock,* 218 Ia. 178, 254 N.W. 313.

15. *State* v. *Maxmell,* 151 Kan. 951, 956, 102 P. 2d 109, 113, recognizes counsel's "right to interrogate jurors."

16. In *Lightfoot* v. *Commonwealth,* 310 Ky. 151, 159, 219 S.W. 2d 984, 989, it was held that a "litigant is entitled to make inquiry of jurors in respect to any matter which will throw light on the background of the juror . . . ." Another Kentucky case where defense counsel examined prospective jurors is *Tarrance* v. *Commonwealth,* 265 S.W. 2d 40, *cert. denied,* 348 U.S. 899, 75 S.Ct. 220.

17. La. R.S. tit. 15, sec. 349 (1950) reads: "Examination of prospective jurors shall be conducted in the manner as now provided by existing laws." *State* v. *Guidry,* 160 La. 655, 656-659, 107 So. 479, 480-481, reveals that "manner". There the court reversed a conviction because counsel was not allowed to examine prospective jurors directly, though the trial judge permitted counsel to suggest questions for

the judge to ask, saying: "Article 1, sec. 9 of the (state) Constitution guarantees the right of a person accused of crime to a speedy public trial by an impartial jury." The trial judge's willingness to re-state questions proposed by defendant's counsel did not cure the defect. "By repetition the questions lose their force and value," and the examination "becomes as unsatisfactory as the examination of a foreign witness by the aid of an interpreter."

18. Minn. Stat. sec. 631.26 (1953) provides that "either party may examine (a prospective juror) . . . ." *State* v. *Baner,* 189 Minn. 280, 281, 249 N.W. 40 states: "Litigants in a case, criminal or civil, are entitled to a fair, competent, and impartial jury. They should have the opportunity on the voir dire examination of the prospective jurors to ascertain . . . any bias they may entertain concerning the subject matter of the action."

19. Miss. Code sec. 1802 (1942) reads: "The parties or their attorneys in all jury trials shall have the right to question jurors . . . and it shall not be necessary to propound the questions through the presiding judge, but they may be asked by the attorneys . . . ."

20. *State* v. *Dill,* Mo., 282 S.W. 2d 456, assumes counsel's right to examine jurors. Missouri cases where parties examined prospective jurors directly include *State* v. *Malone,* Mo., 301 S.W. 2d 750; *McCallum* v. *Executive Aircraft,* 291 S.W. 2d 650; *State* v. *Hoffman,* 344 Mo. 94, 125 S.W. 2d 55; *Harris* v. *St. Louis-San Francisco Ry. Co.,* 60 S.W. 2d 652.

21. In *State* v. *Brooks,* 57 Mont. 480, 486, 188 Pac. 942, 943, the conviction was reversed because of the trial court's limiting of defendant's questioning of prospective jurors. "The voir dire examination of jurors is a right secured to the defendant . . . ."

22. *Oden* v. *State,* 166 Neb. 729, 730, 735, 90 N.W. 2d 356, 357, 360, recognizes a defendant's "right to have his counsel personally conduct a voir dire examination" as

"uniformly and customarily practiced," and kept in force by Neb. R.S. sec. 25-1106 (1943), which provides: "The general mode of summoning, impaneling, challenging and swearing the jury is not changed by this code."

23. *State* v. *McNeil*, 53 Nev. 428, 440, 4 P. 2d 889, 892, labels counsel's examining jurors as "cross-examination". Other Nevada cases which assume that defendant's counsel can examine prospective jurors include *State* v. *Casey*, 34 Nev. 154, 117 Pac. 5; *Bryant* v. *State*, 72 Nev. 330, 305 P. 2d 360; *State* v. *Shaddock*, Nev. 344 P. 2d 191.

24. N.J. Stat. 2A: 78-4 (1951) provides that "all parties may, within the discretion of the court, question any person summoned as a juror . . . ." N.J. Criminal Practice Rule 3:7-2 (b) provides that questions "shall be permitted, within the discretion of the court." *Springdale Park, Inc.* v. *Andriotis*, 30 N.J. Super. 257, 104 A. 2d 327, indicates that the trial judge's discretion does not extend so far as to permit the elimination of direct examination by counsel. "That a party to litigation may examine into the qualifications, attitudes and inclinations of jurors . . . is unquestioned," 30 N.J. Super. at 262, 104 A. 2d at 330. "A wide latitude is allowed counsel in examining on the *voir dire*." *State* v. *Grillo*, 16 N.J. 103, 110, 106 A. 2d 294, 298.

25. *State* v. *Douthitt*, 26 N.M. 533, 535-536, 194 Pac. 879, states that "the rule in this state, as in the majority of the United States, is that the defendant in a criminal case is entitled to make reasonable and pertinent inquires of a juror on his voir dire . . ."

26. In New York, "it is the right of every litigant . . . to interrogate the jurors drawn," *Fortune* v. *Trainor*, 19 N.Y. Supp. 598, 599. In *People* v. *Hosier*, 132 App. Div. 146, 116 N.Y. Supp. 911, *aff'd*, 196 N.Y. 506, 89 N.E. 1107, the conviction was reversed, the court holding that the defendant "was entitled to a reasonable examinaion of each proposed juror," 132 App. Div. at 150, 116 N.Y. Supp.

at 914. Other New York cases recognizing a defendant's right to examine prospective jurors include *People* v. *Jelke*, 284 App. Div. 211, 130 N.Y. S. 2d 662, *aff'd*, 308 N.Y. 56, 123 N.E. 2d 769; *People* v. *Winship*, 309 N.Y. 311, 130 N.E. 2d 634; *People* v. *Rendigs*, 123 Misc. Rep. 32, 205 N.Y. Supp. 133. In *Fischer* v. *Brooklyn Heights R. Co.*, 84 N.Y. Supp. 254, the court held that the right to examine the prospective jurors had been waived.

27. N.C. Gen. Stat. sec. 9-15 (1953) permits "any party" to "make inquiry as to the fitness and competency of any person to serve as a juror." "This section provides and gives the right to the State or to the defendant to inquire of the juror as to his fitness and competency to serve . . . ." *State* v. *Ashburn*, 187 N.C. 717, 721, 122 S.E. 833, 834.

28. N.D. Rev. Code sec. 29-1728 (1943) provides that "Either party . . . may examine the jurors . . . ."

29. Ohio Rev. Code sec. 2945.27 (Baldwin's 1958) reads: "The judge of the trial court . . . shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant . . . ."

30. *Kizer* v. *State*, 67 Okl. Cr. 16, 67, 68, 93 P. 2d 58, 87, 88, recognizes the "right" to examine jurors.

31. Ore. R.S. sec. 17.160 (1957) provides that jurors "shall . . . be examined as to their qualifications, first by the plaintiff, then by the defendant."

32. *Commonwealth* v. *Deysher*, 139 Pa. Super. 497, 500, 12 A. 2d 492, 493, refers to the defendant's "right to examine the prospective jurors under oath." Some cases permitting questioning by defense counsel are *Commonwealth* v. *Figari*, 166 Pa. Super. 169, 70 A. 2d 666; *Commonwealth* v. *Greenberg*, 143 Pa. Super. 203, 17 A. 2d 698.

33. South Dakota cases assuming counsel's right to question jurors within reasonable limits include *State* v. *Krutzfeldt*, 53 S.D. 435, 221 N.W. 53; *State* v. *Chapman*,

1 S.D. 414, 47 N.W. 411; and *State* v. *Mitchell*, 46 S.D. 272, 192 N.W. 487.

34. In Tennessee, "it is the right of the litigant to subject to a rigid examination every man presented to him as a juror . . . ." *Paducah, T. & A. R. Co.* v. *Muzzell*, 95 Tenn. 200, 31 S.W. 999, 1000. The "questions asked by the attorneys are within the discretion of the *attorneys*," *Long v. State*, 187 Tenn. 139, 213 S.W. 2d 37, 40. (Italics supplied.)

35. In Texas, "it is the well established rule of law" that an accused may question jurors. *Livingston* v. *State*, 152 Tex. Crim. App. 302, 306, 214 S.W. 2d 119, 121.

36. *State* v. *Turley*, 87 Vt. 163, 88 Atl. 562, reveals the Vermont practice of allowing examination by counsel, as does *Parker* v. *Hoefer*, 118 Vt. 1, 100 A. 2d 434.

37. Wash. Rev. Code sec. 4.44.210 (1951) provides that prospective jurors are "examined as to their qualifications, first by the plaintiff and then by the defendant. Sec. 10.49.020 makes his section applicable to criminal trials.

38. W. Va. Code sec. 5646 (1955): "Either party . . . may . . . examine on oath any person who is called as a juror."

39. Wis. Stat. sec. 270.16 (1957) recognizes "the right of either party . . . to examine any (prospective juror)". Sec. 957.14 makes sec. 270.16 applicable to criminal cases.

40. In Wyoming, "litigants should be given reasonable opportunity to make inquiries" of jurors, so that counsel may "secure the impartial and disinterested jury which the law contemplates." *Eagan* v. *O'Malley*, 45 Wyo. 505, 511, 21 P. 2d 821, 822. Counsel propound the "interrogatories under our state practice." 45 Wyo. at 513, 21 P. 2d at 823. Other examples of the Wyoming practice permitting counsel to examine prospective jurors directly are *Loy* v. *State*,

26 Wyo.381, 185 Pac. 796; *Johnson* v. *State*, 29 Wyo. 121, 211 Pac. 484; *Starke* v. *State*, 17 Wyo. 55, 96 Pac. 148.

THE OTHER TEN STATES

1. Del. Super. Ct. (Crim.) Rule 24(a) provides: "... the court shall permit or conduct such examination as is reasonably calculated to ascertain prejudice of a juror." If the court conducts the examination, "the court shall permit the defendant or his attorney and the Attorney General to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper." The Delaware rule provides for an even more comprehensive examination than that of the federal courts: "The Delaware Rule on examination of trial jurors is broader than the Federal Rule in that it requires the court to 'permit or conduct such examination as is reasonably calculated to ascertain prejudice of a juror.' " Hermann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327, 332.

2. Me. R.S. c. 113, sec. 101 (1954) provides: "The court, on motion of either party in a suit, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or formed an opinion or is sensible of any bias, prejudice or particular interest in the cause . . . ." *State* v. *Knight*, 43 Me. 11, 114-115, holds that this section applies to criminal trials. But Maine voir dire examinations are not limited to the questions specified in the statute. See, e.g. *State* v. *Albano*, 119 Me. 472, 111 Atl. 753.

3. *Bryant* v. *State*, 207 Md. 565, 583, 115 R. 2d 502, 510, recognizes "the right to discover the juror's state of mind in respect to the matter in hand or any collateral matter reasonably liable to unduly influence him," though the court upheld the trial judge's refusal to ask whether a

juror had ever been a client of either of the state's attorneys.

In *Brown* v. *State* 220 Md. 29, 33, 34, 150 A. 2d 895, 897, the court upheld the trial judge's refusal to ask "whether the jurors had read or heard any accounts of the case in the newspapers or on the radio or television, and whether they had discussed the guilt or innocence of the accused," but reversed, because of the prejudice to the appellant from the failure of the trial court to examine the jurors as to possible racial prejudice. Maryland has no specific rule as to what questions are to be asked on voir dire, *Bryant* v. *State*, 207 Md. at 583, 115 A. 2d at 510. The trial judge cannot relieve himself of his obligations by asking a few general questions. The particular facts involved determine what questions are necessary. With sufficiently massive publicity Maryland would perhaps require questions concerning newspaper articles, though in *Goldstein* v. *State*, 220 Md. 39, 150 A. 2d 900, involving convictions for suborning police officers to perjure themselves, the trial court's refusal to ask jurors about newspaper publicity concerning other matters than those for which the defendants were tried was upheld.

4. "As was said in *Commonwealth* v. *DiStasio*, 294 Mass. 273, 280, 'In this Commonwealth the examination of prospective jurors is "under the direction of the court," whether conducted by counsel, or, as is customary, by the judge. Seldom is it permitted to extend beyond the statutory questions. *Commonwealth* v. *Cero*, 264 Mass. 264, 270, 271. Whether other questions shall be asked is discretionary with the judge. *Commonwealth* v. *Millen*, 289 Mass. 441, 475, 476'." *Commonwealth* v. *Geagan*, 1959 Mass. Adv. Sh. 1107, 1120-1121, 159 N.E. 2d 870, 883.

5. Mich. Ct. Rule 37, sec. 1 provides: "The *voir dire* examination of jurors in all cases may be conducted by the trial judge, or he may, in his discretion, permit such exami-

nation by the attorneys for the respective parties. If made by the judge, counsel for any of the parties desiring that additional matters be inquired into shall request the judge to interrogate the juror relative thereto, which request, if the matter be deemed material, shall be granted."

"It is indispensable to a fair trial that a litigant be given a reasonable opportunity to ascertain on the *voir dire* whether any of the jurors summoned are subject to being challenged for cause or even peremptorily." *Fedorinchik* v. *Stewart,* 289 Mich. 436, 438, 286 N.W. 673, 674. In *People* v. *Lockhart,* 342 Mich. 595, 70 N.W. 2d 802, the Michigan trial judge asked, without a request by counsel, whether the jurors had read or heard anything about the case.

6. N.H. R. S. sec. 500: 32 (1955) provides: "Any juror may be required by the court, on motion of a party in the cause to be tried, to answer upon oath whether he expects to gain or lose by the issue of the cause; whether he is related to either party; whether he has advised or assisted either party, or directly or indirectly given his opinion or has formed an opinion; whether he is sensible of any prejudice in the cause; or whether any one of the counsel in the cause is employed by him in any action then pending in said court. . . ." *State* v. *Sawtelle,* 66 N.H. 488, 530, 32 Atl. 821, 847, interprets the statute to provide for further inquiry—beyond the statuory questions.

7. R.I. G.L. sec. 9-10-14 (1956) provides: "The court shall, on motion of either party in a suit examine on oath a person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein. . . ." In *State* v. *Kieon,* R.I., 152 A. 2d 531, and *State* v. *Greene,* 74 R.I., 437, 60 A. 2d 711, e.g., counsel were permitted to examine

the jurors, the voir dire examination extending beyond the statutory questions.

8. S.C. Code sec. 38-202 (1952) provides: "The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror therein to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion or is sensible of any bias or prejudice therein. . . ." In South Carolina statutory questions and acceptable answers do not constitute a sufficient *voir dire* examination. *Brown* v. *S. H. Kress and Co.*, 170 S.C. 178, 180, 170 S.E. 142, held: "The qualification of a juror is not to be determined alone by the fact that he declares his fairness and impartiality." In *State* v. *Gidron*, 211 S.C. 360, 366, 45 S.E. 2d 587, 589, "the usual questions were propounded. . . . After this was done, the Court said: 'Now, gentlemen, is that satisfactory? If it is not, I want to give the defendant every right.'" The court upheld an examination with no additional questions, but defendant had waived his rights.

9. Utah Code sec. 77-28-1 (1953) provides: ". . . the examination of the jurors shall be conducted by the judge. The judge may permitt counsel for either side to examine the jurors, but such examination by counsel shall be limited by the court." *State* v. *Gregorious*, 81 Utah 33, 16 P. 2d 893, reveals Utah's willingness to vary the voir dire examination in response to the facts of a particular case.

10. Va. Code sec. 8-199 (150) provides: "The court shall, on motion of either party in any suit, or may, of its own accord, examine on oath any person who is called as a juror therein to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein. . . ." Sec. 19-181 makes sec. 8-199 applicable to criminal proceedings. *Rust* v. *Reid*, 124 Va. 1, 20-21, 97 S.E. 324, 329, states that Virginia judges are not to rely

solely on answers to the four statutory questions: "It is not easy to see how jurors who had been intimately acquainted with the deceased for years . . . could disabuse their minds of opinions . . . and render a verdict solely on the evidence adduced at the trial. However honest they may have been in their belief that they could do so, the law does not "put them to such a test, nor subject the administration of justice to the suspicion of partiality." In *Hevener v. Commonwealth*, 189 Va. 802, 811, 54 S.E. 2d 893, 897, "the court gave (the juror) a searching examination," concerning what he knew about the case and what he had read. In Virginia, unlike Massachusetts, a juror's thinking himself qualified does not preclude further voir dire examination.